SUPREME COURT, U. S.
AUG 27 1974

In the Supreme Court of the United States

OCTOBER TERM, 1973

Nos. 73-1055, 73-1069, 73-1070, 73-1071, 73-1072

BOWMAN TRANSPORTATION, INC.; JOHNSON MOTOR LINES, INC.; RED BALL MOTOR FREIGHT, INC.; LORCH-WESTWAY CORPORATION, et al.; UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Appellants,

v.

ARKANSAS-BEST FREIGHT SYSTEM, INC., et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

BRIEF FOR APPELLEES

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF ARKANSAS
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BRIEF FOR APPELLEES

INTRODUCTION

This brief is submitted jointly on behalf of all appellees.[1] No issue is taken with the portions of appellants' briefs entitled "Opinions Below", "Jurisdiction" and "Statutes Involved".

1. Arkansas-Best Freight System, Inc.; Mercury Motors, Incorporated; Alamo Express, Inc.; Braswell Motor Freight Line, Inc.; Campbell Sixty-Six Express, Inc.; Central Freight Lines, Inc.; ET&WNC Transportation Company; Eagle Motor Lines, Inc.; Gordons Transports, Inc.; Holloway Motor Express, Inc.; Mercury Freight Lines, Inc.; Red Arrow Freight Lines, Inc.; Red Line Transfer & Storage Company, Inc.; T.I.M.E.-DC, Inc.; Transcon Lines; Yellow Freight System, Inc.; Roadway Express, Inc.; and Jack Cole-Dixie Highway Company.

QUESTIONS PRESENTED

The questions presented by the United States and the Interstate Commerce Commission reasonably set forth, as far as they go, the issues before this Court. However, the "Questions Presented" submitted by appellees more precisely define the issues:[2]

> "Upon finding orders of the Interstate Commerce Commission, entered after a formal hearing, to be based upon findings and conclusions that were arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law, did the District Court, expressly following a provision of the Administrative Procedure Act, 5 U.S.C. § 706, err by holding such orders to be unlawful?
>
> Was it mandatory that the District Court remand this case to the Commission for further proceedings on the present record; or, if not mandatory, did the court properly decline to remand under the peculiar circumstances and development of the agency record?"

STATEMENT

The order in question involves a decision of the Interstate Commerce Commission disposing of applications by the three motor carrier appellants (Johnson Motor Lines, Inc., Red Ball Motor Freight, Inc. and Bowman Transportation, Inc.; "Johnson", "Red Ball" and "Bowman") that were before the Commission for more than seven years. During that period a massive expansion of carrier operations

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2. Appellees' Motion To Dismiss and Affirm, at 2.

took place with Commission approval.[3] Initially, there were 21 applications that sought major expansions of operating authority within southeastern and southwestern portions of the United States. Ten, including the three here involved, were selected for hearing on a consolidated record before two of the Commission's most experienced hearing examiners[4] (App. 1282).

A joint brief has been filed for appellants, United States of America and Interstate Commerc Commission. They will be referred to herein as "the Government". A separate brief has been filed jointly on behalf of appellants, Bowman, Johnson, and Red Ball, applicants before the Commission, and a group of shippers that testified in support of the Johnson application.[5] They will be referred to collectively as "the private appellants".

Appellees are 18 motor carriers that participated in the Commission proceeding as protestants and in the court below as plaintiffs. They will be referred to collectively as "appellees".

The Government's brief outlines the dates involved and the massive size of the record resulting from the con-

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3. *E.g.*, at the time of the hearing, three carriers provided direct service between Atlanta and Dallas, focal points of the proceeding. At the time of the Commission's decision, there were 13 such carriers. Similar expansions occurred without exception at every city involved (App. 1298-1299). The court below was furnished with a detailed analysis from the record demonstrating the specific increases that occurred at 14 of the principal cities involved. Plaintiffs' Initial Brief (District Court), at 142-145.

4. Now termed "administrative law judges". For consistency, the title "examiners", used in the record, will be utilized here.

5. These shippers did not take the same position, as intervenors before the Commission, that they had taken as witnesses at the hearing. For example, all but 12 had testified in support of one or more of the other applications, in addition to Johnson's, but the arguments that they advanced before the Commission (including those deemed improper by the reviewing court) were submitted only in behalf of Johnson (App. 946-979).

solidation of the ten applications. The examiners accurately summarized the voluminous evidence,[6] finding that there was no public need for the services proposed and that approval of *any one* of the applications would result in a serious deterioration of existing service, contrary to the public interest and the National Transportation Policy (App. 889-892). The examiners' conclusions were predicated, in part, upon the fact that *none of the carrier appellants proposed to supply service to any point or operate over any route that was not already adequately served by multiple carriers.* Instead, each proposed only to render a highly selective form of "overhead" operation, restricting their service to selected major cities. The examiners found that the carriers adequately serving the areas were dependent on volume traffic at the larger cities (that would be served by carrier appellants) in order for them to maintain service to the smaller communities (that would not be served by carrier appellants). They recognized that if any of the applicants were permitted to superimpose its proposed service on that presently provided, it would result in a deterioration of service at major cities and smaller communities along the routes, and would result in forcing existing carriers to increase the amount of their empty vehicle operations within the area[7] (App. 1290, 1300).

Most of the unsuccessful applicants filed exceptions, challenging the examiners' conclusions *but not their specific findings of fact* (App. 1292). At this stage of the proceedings, additional counsel entered the picture and new parties

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6. No party has ever challenged the accuracy of the examiners' summary of the evidence as set forth in their 300-page report (App. 1285, 1292).

7. In view of the fuel crisis, the Commission recently reemphasized its long-standing policy of "minimizing or eliminating" empty vehicle movements. 38 Fed. Reg., No. 228, at 32856-7; No. 231, at 33355-6 (1973).

were permitted to intervene, resulting in the injection of political issues and arguments (App. 1302, 1318).

The final administrative determination of the proceedings resulted in the reversal of the examiners' conclusions (but not their findings) as to three carriers (appellants herein) and the sustaining of their denial of the remaining seven applications. This was by a two-to-one vote of a division composed of three of the eleven commissioners.[8] The 11-member Commission declined to review this decision, holding that "no issue of general transportation importance is involved" (App. 1281).

In discussing the decision of the Division, the private appellants make several comments in their "Statement" section which are contrary to the actual recitations in that decision. For example, at page 8 of their brief, they state that "the Commission rejected the examiners' findings and adopted only their 'summary of the evidence presented by the protestants [appellees] as to their authorities, equipment and operations.'" This statement is erroneous. If the Division had, in fact, "rejected the examiners' findings" as suggested by private appellants (for the first time), this would have left the Division's report devoid of findings to support essential conclusions. The Division's conclusion, for example, that applicants are "financially and

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8. A dissenting opinion (App. 1323), favoring the denial of all applications, appears as a part of a subsequent decision by the same division after reopening the proceeding for the purpose of approving the application of one more applicant, Jones Truck Lines, Inc. See *Jones Truck Lines, Inc., Extension—Atlanta, Georgia*, 117 M.C.C. 586, 597 (1972). Appellees, as plaintiffs below, sought to supplement their complaint so as to seek review of *Jones* as a part of the present case; however, the Court overruled these efforts (App. 1278, 1320-1325), and a separate suit challenging *Jones* is now pending before the District Court for the Western District of Missouri, Springfield Division. At the Government's request, *Jones* is being held in abeyance awaiting decision herein.

otherwise fit and able properly to perform the proposed services" is based upon findings that appear *only* in the examiners' report, but are not mentioned in the Division's report. Taking note of this fact in their final pleading before the Commission, the private appellants defended the Division's reliance upon factual findings that appear only in the examiners' report.[9]

As found by the court below, "at no point in its report did the Division reject any of the Examiners' findings of fact" (App. 1292). Moreover, in its brief before the District Court, the Government asserted that the Division's report "does not reflect any disagreement with the examiners over what the witnesses said or what the exhibits stated" (App. 1293).

In another erroneous assessment of the Division's order, the private appellants indicate that the Division felt that the examiners' analysis of evidence on a commodity basis had resulted in an "atomized treatment" (Brief 8). No such definitive or conclusive finding was made by the Division. It stated that a geographic statement of the evidence might point up the facts more clearly. This, however, was unnecessary inasmuch as the examiners, within the commodity breakdown which they used, carefully analyzed the geographic aspect of the testimony. Thus, the examiners' findings and report were predicated not

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9. *E.g.*, "The examiners' recitation of the details of Johnson's financial picture leaves no room for doubt as to its financial ability to do what it proposes. The examiners' findings are in accord with and are fully supported by the evidence. The Commission *properly relied upon those findings* in reaching its ultimate conclusion . . ." Reply of Johnson to Petitions for Reconsideration, dated August 16, 1972, at 43 (emphasis added). The same argument appears in Bowman's Reply to the same petitions, dated August 10, 1972, at 36.

only upon a general commodity basis, but also upon a geographic basis (App. 980-1042).[10]

Another factual mistake in the private appellants' brief is the statement at page 9 that petitions for reconsideration of the Division's decision were pending from December 30, 1971 until September 6, 1972. Actually, the Division's decision was not served until January 24, 1972 (App. 101). Following the service of such order, appellees and others filed petitions for reconsideration, and all but one of the petitions were summarily denied by the Commission only 12 working days after the replies thereto were filed.[11]

Other factual misstatements in private appellants' brief will be discussed in the "Argument" section, *infra*.

The present suit charged that the Division's decision was invalid and prayed that the enforcement of its order be enjoined.[12] In its opinion the District Court summarized the Division's report in detail and carefully set forth the reasons why it found the Division's order to be invalid (364 F. Supp. 1239; App. 1292). The opinion is clear and comprehensive. Briefly stated, the court concluded that there was no rational basis for the determinative findings and conclusions in the Division's report. It found that the Division arbitrarily and capriciously applied a discriminatory double standard by, for example, giving great weight to evidence favorable to private appellants while ignoring or expressly refusing to accord weight to the same or similar evidence favorable to appellees.

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10. A summary of the examiners' handling of the witness testimony pointing up the geographic, as well as the commodity basis of consideration, is found in appellees' initial brief to the court below, beginning at 40.

11. The exception being that of Jones, whose application was reopened and granted. See n. 8, *supra*.

12. The complaint set forth in comprehensive detail the numerous grounds upon which appellees rely. It was not challenged by any pre-hearing motion or other attack.

The court, therefore, set aside the Division's order and enjoined the issuance of the certificates authorized therein, concluding that the Division's findings and conclusions were "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law", pursuant to the Administrative Procedure Act (APA), 5 U.S.C. § 706. The court affirmatively refrained from expressing any opinion concerning the ultimate issue of public convenience and necessity, recognizing the Commission's exclusive prerogative to make such determination.

Following judgment, the Government moved the court to amend the judgment and remand the proceedings to the Commission. This motion was based upon the allegation that the court had no jurisdiction to do other than as requested by the Government and that remand was, therefore, mandatory[13] (App. 795). The court denied the motion (364 F. Supp. 1239, 1266; App. 808, 809-823).

SUMMARY OF ARGUMENT

The reviewing court made a probing, in-depth review of the entire agency record, and found substantial legal error. It concluded that the agency's actions, findings and conclusions were without rational basis; that the agency violated basic rules of fairness; and that its report "sounds more in advocacy than in impartial adjudication" (App. 1319).

The court properly reviewed the entire record, and correctly refused to limit its consideration to portions of the record or to one side of the case.

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13. This was the only remand question raised in the court below. Therefore, the only remand question properly before this Court is whether remand was mandatory. See *infra*, p. 65.

The standards for judicial review of this proceeding are found in § 706 of the APA. This section must be *considered in its entirety.* The substantial evidence test of § 706(2)(E) is applicable. Also applicable is the arbitrary or capricious test of § 706(2)(A). Neither test is exclusive. Neither test is paramount. Either or both may be applied to the review of agency action based upon an adjudicatory hearing. The latter standard is particularly descriptive of the prejudicial and discriminatory action that permeated the agency's report in this case, because such action was "arbitrary," "capricious," and "without rational basis."

In reaching its conclusions, the reviewing court did *not* find the actions and conclusions of the agency to be supported by substantial evidence, nor did the court find that the agency made erroneous findings of fact. Instead, the court properly concluded, *as a matter of law,* that the agency's improper treatment of the evidence resulted in conclusions that lacked a rational basis. In so holding, the court was not weighing the evidence.

The reviewing court's construction and application of the judicial review provisions of the APA were fully consistent with the legislative history and plain language of § 706. Both compel recognition of the six *separate* standards of review enumerated therein. No new standard of review was applied, nor was there an enlargement of the statutory scope of review. The decision specifically follows the precedents of this Court and comports with the practice of reviewing courts in other jurisdictions . Where agency action is lacking in rational basis it is arbitrary and capricious and must be set aside.

After finding substantial legal error in the agency's report, the court set the order aside and enjoined its enforcement. Following entry of judgment, the Government (but not the private appellants) moved the court to amend

the judgment on the ground that the court lacked jurisdiction to set aside the agency order without directing that the case be remanded for further proceedings. The Government's suggestion, made for the first time after entry of judgment, was based solely on the contention that the court *must*, not *should*, remand the proceeding. No one suggested to the court that remand would serve any useful purpose. The District Court overruled the motion, noting that its judgment did not preclude the agency from proceeding to determine the issue of public convenience and necessity. The court held that, under the unique circumstances of this case, further determination of this issue by the agency could best be made on a new record, explaining that use of the present record would impede rather than facilitate such determination. The court found that the present administrative record is beyond repair: it includes tremendous portions unrelated to the three applications here involved; it includes improper political issues injected after issuance of the examiners' report; and it includes evidence presented in 1966 and 1967 that would not be helpful to the Commission in making a further determination of the present and future public convenience and necessity.

Remand is not mandatory. It is a matter committed to the sound discretion and considered judgment of the reviewing court. Unless it would serve a useful purpose, remand is inappropriate. The court properly concluded that it would serve no useful purpose here.

A comprehensive, in-depth review and fair assessment of the record as a whole was made by the reviewing court. Accordingly, this Court need not make an independent review of the agency record, but, instead, should follow its usual rule of noninterference. The unanimous decision of the three-judge court should be affirmed.

ARGUMENT

I

The Court Properly Found Substantial Error in the Division's Decision

Appellants place emphasis upon the size of the agency record. It is indeed large since it embraces major application proceedings of 10 carriers. Although this case involves only the applications of Bowman, Johnson, and Red Ball,[14] appellants emphasize the large number of witnesses that testified in support of the 10 applications, considered collectively.[15] The presentation of 10 applications on a single record produced many unique developments, due to the overlapping aspects of the applications and the various applicants' opposition to the other applications. Each applicant's presentation, therefore, embraced criticisms of other applicants' service and demonstrated that all of the involved carriers, applicants and protestants alike, operate under similar conditions and perform similar services.

None of the applicants proposed to render any new or different type of service or to provide service at any point not served by multiple carriers. They sought only to supplement existing service by performing a highly selective

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14. A separate suit is pending as a result of the Commission's approval of the Jones application on the basis of the same record. See n. 8, *supra*.

15. The examiners noted: "Almost every shipper . . . is inclined to support the application of any carrier who promises better service than he already has available. As the Commission has noted in other proceedings [*Transamerican Freight Lines, Inc. —Purchase (Portion)—Allen Motor Lines*, 59 M.C.C. 695, 722], the number of shipper witnesses which an applicant can present at a hearing to testify that their service is inadequate appears to be governed largely by the energy put forth and the expense it is willing to incur" (App. 878).

operation, serving only the major cities, while leaving to others the responsibility of handling the less desirable traffic at smaller communities (App. 1283).

In their detailed and comprehensive report, the examiners analyzed *all* of the evidence and summarized their findings of fact in a series of appendices to their report. They concluded that approval of *any one* of the applications would result in a deterioration in existing service, both at major cities and at smaller points along the proposed routes, contrary to the National Transportation Policy[16] (App. 889-892, 903-905).

Exceptions were filed that challenged the ultimate conclusions of the examiners. "No exception was taken, however, to any specific finding of fact" (App. 1292). In their brief, at 42-43, the private appellants argue that their exceptions did not concede the correctness of the examiners' findings of fact, but they still point to no inaccuracy in such findings. To demonstrate the absence of any challenge to the examiners' statement of the facts, the exact exceptions filed by such parties are quoted in Appendix I hereto.

The examiners' decision was based strictly upon the facts of record (including facts specifically made the subject of official notice). When the case came before a Division of the Commission, however, the character of the

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16. 49 U.S.C. preceding § 1. "To the extent that carriers may be failing properly to perform under their certificates and under the terms of section 216(b) of the Interstate Commerce Act, remedies are available other than the granting of authority to more carriers. We do not believe that authorization of additional carrier services in an area served by an adequate number of carriers fosters sound economic conditions in transportation; nor is it the only way to minimize the service failures and improve service to the public. Where complaints of these failures have been made to the carriers or proper authorities, remedial action has been taken" (App. 874).

proceeding was changed by the injection of extraneous issues, largely political in nature.[17] The entire tenor of the Division's report differs sharply from that of the examiners'. Every contention advanced by the parties, and all facts bearing upon such issues were discussed in detail in the examiners' report; and it is obvious that they considered such issues in a wholly impartial manner. The Division's report, however, discussed only those facts favorable to the applicants and completely ignored facts and issues stressed by protestants. Although contrary conclusions were reached by the Division, its report did not take issue in any respect with any finding of fact set forth in the examiners' report.

This proceeding was before the District Court exactly one year.[18] At the time of oral arguments on the merits, appellees introduced the entire record made before the Commission. Previously, each Judge[19] had been furnished with: (a) a comprehensive abstract of the evidence prepared by Johnson and Bowman (7 volumes; 3,200 pages);[20] (b) another comprehensive abstract of the evidence pre-

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17. "After intervening, the Johnson shippers injected new issues, not presented to the Examiners. The shippers' contentions were more political than judicial. They urged liberalization of the traditional regulatory requisites for certifications, stating that a change in Commission policy was favored by the Administration" (App. 1302).

18. During its pendency, a temporary restraining order was in effect. It was issued following submission of affidavits, briefs and oral arguments, as described in the court's opinion which contains detailed findings and conclusions. 350 F. Supp. 539 (W.D. Ark. 1972).

19. The panel was composed of Chief Judge Pat Mehaffy, United States Court of Appeals, Eighth Circuit; Senior District Judge John E. Miller; and District Judge Paul X Williams.

20. Acknowledging the size of the record, these appellants urged the District Court, as they had urged the Commission, to utilize such abstract which "capsules this huge record into workable proportion" (Bowman Brief, at 3-4; Johnson Brief, at 9).

pared by Red Ball and appellees (7 volumes; 1,647 pages);[21] (c) an extensive summary of the evidence contained in the 300-page report of the examiners; (d) another summary contained in the Division's 225-page report; and (e) seven comprehensive briefs containing detailed quotations and summaries of the evidence (over 1,200 pages). Each judge therefore had before him summaries, excerpts, charts and briefs totaling approximately 6,600 pages.

During the arguments, the parties urged the court to render a prompt decision (App. 531-532, 541-542, 555-556). The court, acknowledging familiarity with the briefs previously submitted, announced that it would prepare its decision "as quickly as we can" (App. 464, 566, 581).[22] The court's opinion demonstrates its independent research and its careful consideration of every facet of the case.

Appellees challenged the Division's report, primarily on the ground that the Division acted arbitrarily and capriciously and grossly abused its discretion. The reviewing court *found much wrong with the Division's decision.* It did not base its decision expressly upon a conclusion that the Division's action "was not supported by substantial evidence." At the same time, however, the court clearly did *not* find that there *was* substantial evidence to support the Division's action. The court reviewed the entire agency record and concluded that the Division had acted arbitrarily and capriciously and had abused its discretion. Repeatedly, the court found that there was no rational basis for the actions, findings and conclusions

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21. "The two sets of abstracts are strikingly similar and provide an accurate summary of the evidence of record" (App. 1280).

22. Private appellants insinuate that the court acted hastily (Brief 10); but it had 7 months to study the initial brief, 4 months to study defendants' briefs, 2 months to study the reply brief, and 6 weeks to consider oral arguments before rendering its decision.

of the Division, and in each instance the court described in detail the basis for its conclusions. The court pointed out that in some instances the Division's conclusions were directly contrary to the Division's findings of fact. In other instances it found that the Division ignored facts of record and, in still other instances, it found that the Division applied a prejudicial double standard to its treatment of the evidence. In essence, the court found that the Division did not apply the "basic rudiments of fairness" (App. 1314). Its analysis of the Division's action was summarized as follows:

> "Viewed in its entirety, the Division's report indicates a predilection to grant these particular applications, followed by a strained attempt to marshal findings to support such conclusion. In applying different standards to evidence presented by applicants as contrasted with evidence presented by protestants, and in some instances to the same evidence, the report sounds more in advocacy than in impartial adjudication." (App. 1319).

All parties agree that the reviewing court was proper in applying the judicial review standards found in Section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 706 [hereinafter referred to as § 706].[23] Appellants base their

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23. This section provides that the reviewing court shall:

"(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(Continued on following page)

appeal on the contention that the reviewing court erred in refusing to apply the "substantial evidence" test of § 706(2)(E) as the *only* standard applicable to its review of this proceeding. Appellees contend that the court properly considered § 706(2) in its entirety and correctly applied the "arbitrary or capricious"[24] test as the standard that best describes the discriminatory and prejudicial action that permeated the Division's report; and, further, that *the court unquestionably reached the right result.*

In deciding this case, however, there is no compelling necessity to catalogue the court's terminology in terms of the separate standards of review prescribed in § 706(2). Appellants cannot deny that: (1) the court engaged in an extensive in-depth review of the entire agency record, and (2) the court found that there was much wrong with the agency's decision.

It would be a gross miscarriage of justice to permit the Commission's order in this case to become effective. The Division's report was not based upon the evidence of record, nor upon a consideration of the National Transportation Policy, nor was it made in furtherance of the public interest. The reviewing court correctly found that the agency's action was unlawful and properly enjoined its enforcement.

Footnote Continued—

> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
>
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.
>
> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party and due account shall be taken of the rule of prejudicial error."

24. The provisions of § 706(2)(A) will, for convenience, be referred to as the "arbitrary or capricious" test, but, of course, this also embraces "an abuse of discretion" and "otherwise not in accordance with law."

II

The Reviewing Court Applied Proper Standards of Judicial Review

The reviewing court clearly recognized that "[t]he limited scope of judicial review of the decisions of independent agencies is a well settled principle of administrative law," and in discussing this principle, the court cited and quoted from the identical authorities relied upon by the appellants (App. 1304).[25]

The reviewing court engaged in an exhaustive, detailed review of the agency proceeding and reached the unanimous conclusion that the Division's action was unlawful for many reasons. The court's opinion described in detail the action, findings, and conclusions of the Division that were not proper, and explained, also in detail, the bases for its decision. As it was required to do, the court reviewed the entire record of the proceeding before the Commission, and tested the lawfulness of the agency's action under the standards prescribed in § 706.

Private appellants argue that the "substantial evidence rule was held inapplicable" (Brief 12). This is not correct. The court recognized the applicability of the several standards of § 706(2), including the substantial evidence test and the arbitrary or capricious test (App. 1304, 1305). More specifically, the court expressly rejected appellants' argument that it should *limit* its review to those portions of the record cited by them (App. 1309). Instead

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25. *E.g., Consolo* v. *Federal Maritime Commission*, 383 U.S. 607 (1966); *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951); *United States* v. *Pierce Auto Freight Lines*, 327 U.S. 515 (1946); *Willis Shaw Frozen Express, Inc.* v. *United States*, 256 F. Supp. 257 (W.D. Ark. 1966); and *Patterson* v. *United States*, 178 F. Supp. 771 (W.D. Ark. 1959).

of limiting its review "to a determination of the substantiality of such portions of the evidence" referred to by appellants in their briefs, the court recognized its duty under § 706 to review "the record in its entirety . . . including the body of evidence opposed to the Board's view" quoting from *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 488 (1951) (App. 1309). Also quoted was Justice Frankfurter's statement (340 U.S., at 488) that: "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight" (App. 1307).[26]

Appellants urged the court to adopt the outdated procedure followed by some courts prior to the enactment of the APA. As expressed by Justice Frankfurter "[u]nder this interpretation, the courts need to read only one side of the case and, if they find any evidence there, the administrative action is to be sustained and the record to the contrary is to be ignored." 340 U.S. at 481. The reviewing court properly rejected this argument (App. 1309).

The court also rejected appellants' contentions that it should limit its consideration to a determination of the *substantiality* of the evidence (App. 1307). The court properly ruled that it could not confine its review to an examination of the substantiality of the evidence in a case such as this where it was charged that the conclusions reached by the agency lacked rational basis (App. 1307). The court recognized that § 706(2)(A) requires the reviewing court to "set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" (App. 1307).

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26. Of course, the statute itself requires the court to review "the whole record or those parts of it cited by a party." 5 U.S.C. § 706.

A

The Arbitrary or Capricious and the Substantial Evidence Standards of the Administrative Procedure Act Are Not Synonymous

Appellants take the position that the court cannot properly set aside agency conclusions, based upon an adjudicatory proceeding, on the ground that the agency acted arbitrarily, or capriciously, or abused its discretion, or took action that was otherwise not in accordance with law. They argue that, in a proceeding of this type, the court can do nothing more than examine the substantiality of the evidence. As stated by private appellants, "where such substantial evidence supports the agency decision, the judicial review function of the Court is ended"[27] (Brief 15).

In its Jurisdictional Statement, the Government asserted that "absent questions of the agency's authority which are not involved here, an agency determination in adjudicatory proceedings which is supported by substantial evidence cannot properly be found to be 'arbitrary or capricious'" (J.S. 10). Now, the Government is not as rigid. It asserts at one point that the agency's decision must be upheld if "free of legal error and supported by substantial evidence in the record as a whole"[28] (Government Brief 10). At another point, the Government concedes that "if the ultimate conclusion were totally unrelated to the findings, then the decision of the agency would be 'arbitrary and capricious' even though each

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27. They made similar arguments in the District Court (Bowman Brief 10; Johnson Brief 13; Lorch Brief 6).

28. Clearly, the court here found the agency's action replete with legal error and, as hereafter discussed, the court did *not* find it to be supported by substantial evidence.

finding might be supported by substantial evidence" (*Id.* at 21, n. 8).

Appellants predicate their argument on the proposition that the reviewing court found the Division's order to be supported by substantial evidence. Not so! The court did not make such a finding. It found that the Division's conclusions were based upon subordinate findings "that can be supported only by a consideration of portions rather than the entire record," and that the Division's "ultimate conclusion" was not based upon "adequate subordinate findings" (App. 1309, 1317). The court made it clear that it did not consider the Division's conclusions to be supported by substantial evidence when it found that "the Division's report indicates a predilection to grant these particular applications, followed by a strained attempt to marshal findings to support such conclusion" (App. 1319).

Unquestionably the court did not find that substantial evidence supported the Division's critical conclusion that "protestants have not shown that they would be seriously adversely affected by such grants." On the contrary, the court held: "This conclusion is directly contrary to the Division's findings of fact set forth in an appendix to its report" (App. 1316).

The Government takes the position that, "as applied to fact finding" the arbitrary or capricious test "is synonymous with the 'substantial evidence' test." More specifically, the Government asserts that the arbitrary or capricious test "is not an additional test," but is merely a "generic standard" that finds "specific application" in the remaining standards of § 706(2) (Brief, at 19, 21).

This narrow construction is incompatible with the language of the statute. In fact, its invalidity is illustrated by the Government's recognition that even if the

substantial evidence test is met, an agency decision can still be "arbitrary or capricious" if "the ultimate conclusion were totally unrelated to the findings" (*Id.* at 21, n. 8). Logically, of course, this *must* be recognized; otherwise, the arbitrary or capricious standard would have no effective meaning.

At another point, the Government again demonstrates the fallacy of its argument by conceding that "action taken without a rational basis" must be recognized as "arbitrary or capricious" action (*Id.* at 18). That is *exactly what the reviewing court held in the case at bar* (App. 1317). Time after time, the court found that there was "no rational basis" for the Division's action. In at least seven instances[29] the court made this finding in regard to significant conclusions reached by the Division, and in each instance the court described in detail the action taken by the Division and explained why there was "no rational basis" for such action. The court also made numerous *additional* findings of agency action found to be arbitrary or capricious.[30] Some of these examples are quoted in Appendix II hereto.

As noted, the court stated that "arbitrary or capricious" means "without rational basis." This is the consistent definition given the standard.[31] The suggestion

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29. App. 1310 (para. 12), 1311 (para. 13), 1311 (para. 14), 1312 (para. 15), 1313 (para. 16), 1314 (para. 21), 1316 (para. 21).

30. *E.g.*, App. 1311 (para. 12), App. 1311 (para. 13), App. 1313 (para. 17), App. 1313 (para. 18), App. 1314 (para. 20), App. 1315 (para. 21).

31. *E.g., Carlisle Paper Box Co.* v. *NLRB*, 398 F.2d 1, 6 (CA3 1968); *South Dakota* v. *Volpe*, 353 F. Supp. 335, 339 (S.D. 1973); *Campbell Sixty-Six Express, Inc.* v. *United States*, 258 F. Supp. 529, 535 (W.D. Mo. 1966); *Eastern Cent. Motor Carriers' Ass'n* v. *United States*, 239 F. Supp. 591, 594-595 (D.C. 1965). See also, *e.g., Hughes Air Corp.* v. *CAB*, 482 F.2d 143, 145-146 (CA9 1973); *Nashua Motor Express, Inc.* v. *United States*, 230 F. Supp. 646, 650 (N.H. 1964).

that the substantial evidence standard should be equated with the arbitrary and capricious standard is an argument advanced for the first time in appellants' briefs before this Court.

The reviewing court clearly understood and properly applied the standards of § 706(2) and correctly characterized the agency's error in terms of such standards. This section requires the reviewing court to hold unlawful and set aside agency *action, findings,* and *conclusions* found to violate *any* of the *six separate standards* stated in subparagraphs (A) through (F). The separate nature of these standards is manifested by use of the disjunctive term "or" that appears before the last of the six standards.[32]

The Government's argument that the arbitrary or capricious standard "is not an additional test" is directly contrary to the views expressed by this Court as well as other courts that have been called upon to consider the scope and meaning of this statute. While citing no decision to support this contention, appellants criticize the District Court for its reliance upon *Citizens To Preserve Overton Park, Inc.* v. *Volpe,* 401 U.S. 402 (1971). They

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32. The disjunctive term "or" is employed in a statute to show that the failure to comply with *any* requirement therein imposes liability. 1A Sutherland, Statutory Construction § 21.14 (C. Sands 4th ed. 1972). Furthermore when, in a statutory enumeration of things, the disjunctive term "or" is placed immediately before the last member of the series (as between § 706(2)(E) and (F)), the term "or" is understood to exist between the previous members. 50 Am. Jur. *Statutes* § 281, at 267.

Congressional intent to separate the standards by use of the term "or" was noted on the floor of Congress during debate over the standards for review in § 5(a) of the Walter-Logan bill, a forerunner of § 10(e) of the APA (§ 706). See text *infra,* pp. 34-38. Congressman Hobbs stated: ". . . [T]hese provisions are in the disjunctive; not in the conjunctive. Each of the grounds under consideration is separated from the next by the word 'or.' So that for *any* of these reasons the court may set aside the decision of the board." 86 Cong. Rec. 4669 (1940) (emphasis added).

take the position that this Court overspoke itself in *Overton* and that the District Court's reliance upon this decision was misplaced. We strongly disagree. *Overton* should not be modified as suggested by appellants since it does nothing more than apply the express provisions of the statute in a way that is fully consistent with the legislative history of the Act.[33]

In *Overton* this Court stated that in determining the "standard for review" it is necessary to "look to § 706 of the Administrative Procedure Act . . . which provides that a 'reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found' not to meet *six separate standards.*" 401 U.S., at 413 (emphasis added). The Government takes the forthright position that this Court was wrong; that the statute does *not* set forth "six separate standards"; that the arbitrary or capricious standard "is not an additional test" but is simply a "generic standard" that must find "specific application" in one of the other standards stated in the section (Brief 11-21).

The error of this attack on *Overton* becomes more apparent when it is borne in mind that the agency decision involved in that case was set aside *solely* because it failed to stand scrutiny under the arbitrary or capricious standard—not because it failed to meet one of the other standards embodied within this so-called "generic standard".

Appellants contend that the arbitrary or capricious standard should be followed only in nonadjudicatory proceedings. They argue that only the substantial evidence standard can be applied to agency action resulting from adjudicatory proceedings. This does not stand the test of logic, and would, indeed, compel a modification of *Over-*

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33. See *infra*, p. 34 *et seq.*

ton since the contention runs contrary to the Court's very deliberate analysis of the statute:

> "*In all cases* agency action must be set aside if the action was 'arbitary, capricious, an abuse of discretion, or otherwise not in accordance with law' or if the action failed to meet statutory, procedural, or constitutional requirements. . . . In certain narrow, specifically limited situations, the agency action is to be set aside if the action was not supported by 'substantial evidence.' And in other equally narrow circumstances the reviewing court is to engage in a de novo review of the action and set it aside if it was 'unwarranted by the facts.'" 401 U.S., at 413-414 (emphasis added).

This Court, in *Overton*, referred to the arbitrary or capricious test as "the generally applicable standards of § 706 [that] require the reviewing court to engage in a substantial inquiry." While acknowledging the presumption of regularity attributable to agency action, the Court emphasized that the presumption "is not to shield [agency] action from a thorough, probing, in-depth review." 401 U.S., at 415. Verification that the agency acted within its statutory authority is not enough. Section 706(2) (A) requires a finding that the actual choice made was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . . To make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." 401 U.S., at 416. This is the law applicable to the case at bar, and this is *exactly* what the reviewing court followed.

There is no logical basis to support the Government's position that this type of review *must* be made in non-adjudicatory proceedings and that it *cannot* be made in adjudicatory proceedings.

If an agency fails to base its decision "on a consideration of the relevant factors" it cannot "shield [its] action from a thorough, probing, in-depth review" simply because it conducted a hearing. The provision for hearing does not constitute license to disregard "the basic rudiments of fairness."

Hearing or no hearing, an agency cannot be permitted to apply a discriminatory double standard to the parties involved. Regardless of the nature of the proceeding, the "law does not permit an agency to grant to one person the right to do that which it denies to another similarly situated. There may not be a rule for Monday, another for Tuesday, a rule for general application, but denied outright in a specific case" (App. 1311). Clearly, a hearing is not a shield to protect improper agency action. On the contrary:

> "The provision for a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance with it. To refuse to consider evidence introduced, or to make an essential finding without supporting evidence, is arbitrary action."[34] (App. 1314).

The reviewing court found much wrong with the Division's treatment and consideration of the evidence.[35] In reaching its conclusions, the court made the type of "thorough, probing, in-depth review" required by *Overton*. It did not act "automata" nor "rubberstamp" the agency's decision. Instead, it exercised the type of "informed professional critique" commended by Justice Frankfurter as

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34. *Baltimore & O.R. Co. v. U. S.*, 264 U.S. 258, 265 (1924).

35. *E.g.*, "the Division's report fails to meet the requisites of clarity." (App. 1310). Appellants do not base their appeal on this finding, since they recognize that it was not determinative of the issues, although the Government does suggest that the Court's criticism was "unwarranted." (Brief 33-34).

the ultimate safeguard against administrative autocracy. *Universal Camera Corp.*, 340 U.S., at 489.

The court was proper in conducting its review pursuant to the standards of § 706(2) (A). Such standards, when applied to an agency's *action*, *findings*, and *conclusions*, do apply to adjudicatory proceedings and do not prescribe standards that are "synonymous with the 'substantial evidence' test."

In applying the 706(2) (A) standard to this action, the court was merely accepting its statutory responsibility, recognized by reviewing courts in jurisdictions throughout the country. It was neither fashioning a new standard of review, nor enlarging upon the proper scope thereof.

For example: *Campbell Sixty-Six Express, Inc.* v. *United States*, 258 F. Supp. 529, 535 (W.D. Mo. 1966) ("We find that the 'ultimate conclusion' reached by the Commission on the test of actual competition is not based on any 'adequate subordinate findings' and is therefore, in the legal sense, 'arbitrary and capricious'."); *Columbia Shippers and Receivers Ass'n, Inc.* v. *United States*, 301 F. Supp. 310, 319 (Del. 1969) (". . . the Court must apply, *in addition* to the 'substantial evidence' test generally applicable to this action, the standard of review set forth at 5 U.S.C. § 706(2) (A)."); *Eastern Central Motor Carriers Ass'n* v. *United States*, 239 F. Supp. 591, 594 (D.C. 1965) ("Under Section 10 of the Administrative Procedure Act, as applicable here, an order of the Interstate Commerce Commission may be invalidated if it is *either* '(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . (3) in excess of statutory rights . . . (5) unsupported by substantial evidence . . .'."); *Mitchell Bros. Truck Lines* v. *United States*, 225 F. Supp. 755, 758 (Ore. 1963), *aff'd* 378 U.S. 125 (1964) ("[The

order is invalidated] if it is *either* (1) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law; *or* . . . (5) unsupported by substantial evidence . . ."); *Heavy-Specialized Carriers Conference* v. *United States*, 231 F. Supp. 968, 970 (E.D. Mo. 1964) ("The scope of judicial review is narrow and we cannot substitute our own view for that of the ICC, if its view is supported by substantial evidence *and* is not arbitrary or capricious."); *Nashua Motor Express, Inc.* v. *United States*, 230 F. Supp. 646, 650 (N.H. 1964) (" . . . this court is bound to inquire into every aspect of the proceedings below wherein it may appear that the Commission has otherwise applied an erroneous standard of law, *or* has made arbitrary findings, *or* has reached ultimate conclusions without adequate subordinate findings . . ."); *Youngblood Truck Lines, Inc.* v. *United States*, 221 F. Supp. 809, 812 (W.D. N.C. 1963) ("The scope of judicial review of an Interstate Commerce Commission order includes consideration of whether the ultimate conclusions of the Commission are supported by substantial evidence on the record considered as a whole, are free from errors of law, *and are not so arbitrary or capricious as to constitute an abuse of discretion.*"); *Omaha Grain Exchange* v. *United States*, 194 F. Supp. 929, 934 (Neb. 1961) ("[Commission order will be affirmed] unless we find *either* that the orders are capricious *or* arbitrary *or* contrary to statutory authority *or* unsupported by substantial evidence."); *Stott* v. *United States*, 166 F. Supp. 851, 855 (S.D. N.Y. 1958) ("[The APA] provides . . . that the reviewing court shall 'hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,' . . . (5) unsupported by substantial evidence . . ."); *Clearfield Cheese Co.* v. *United States*, 308 F. Supp. 1072, 1074 (W.D. Mo. 1969) ("Section 706, Title 5, U.S.C. . . . states that review shall

be on the 'whole record' and that the reviewing court shall 'hold unlawful and set aside agency action, findings and conclusions found to be' arbitrary, capricious, abuse of discretion, or otherwise unlawful *or* contrary to a constitutional right, power, privilege or immunity, *or* in excess of agency jurisdiction, *or* unsupported by substantial evidence, *or* arrived at without observance of lawful procedure *or* 'unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court'."); *Charlton* v. *United States*, 412 F.2d 390, 398 (CA3 1969) (Stahl, J., concurring: "The very listing of the substantial evidence test as a separate and alternative ground for reviewing agency action indicates a legislative intent that it be a *different standard* from that permitting the setting aside of the findings or conclusions of an agency as arbitrary, capricious or an abuse of discretion."). (Emphasis added in all quotations above.) See also, *Associated Indus. of N.Y.S., Inc.* v. *United States Dept. of Labor*, 487 F.2d 342, 349-350 (CA2 1973); *Federal Compress & Warehouse Co.* v. *United States*, 319 F. Supp. 917 (W.D. Tenn. 1970); *Short Line, Inc.* v. *United States*. 290 F. Supp. 939 (R.I. 1968); *Petroleum Carrier Corp.* v. *United States*, 258 F. Supp. 611 (M.D. Fla. 1966).

Private appellants make an ineffective attempt to distinguish the cases cited above that were included in Appellees' Motion to Dismiss and Affirm. They state: "None of them involved the substitution of the arbitrary and capricious rule for the substantial evidence rule in reviewing an agency decision based upon a formal hearing on the record" (Brief 35). No question of substitution is involved. As shown above, however, *all* such cases recognized the applicability of the arbitrary or capricious test to "agency decision based upon a formal hearing on the record" and, in several, the agency action was set aside, *not for lack of substantial evidence*, but because such ac-

tion failed to comply with the standards of § 706(2) (A). That is appellees' point! The reviewing court, in the case at bar, applied the same scope of judicial review consistently followed by reviewing courts throughout the country.

B

Other Applications by This Court of the Arbitrary or Capricious Standard for Adjudicatory Proceedings

In addition to *Overton*, this Court on other occasions in reviewing adjudicatory proceedings has recognized that the arbitrary or capricious standard is separate from the substantial evidence standard. The arbitrary or capricious standard has been applied by this Court together with, or completely apart from the substantial evidence test. This Court has not found it necessary in every instance to indicate expressly that it was utilizing the arbitrary or capricious standard; but, in such instances, the rationale for each decision allows no other conclusion.

The separateness of the two standards was impliedly recognized in *Atchison, T. & S.F.R. Co.* v. *Board of Trade*, 412 U.S. 800 (1973), wherein the ICC, after hearing, approved separate charges for services previously provided under base rates. The three-judge District Court held that the conclusions underlying the agency action *were supported by substantial evidence*, but, notwithstanding, set the order aside because the Commission "had not adequately justified its failure to follow 'its long established rule' " for determining the reasonableness of such charges. *Id.*, at 805.

There was no majority opinion, but five members of the Court agreed that the District Court had acted properly in this respect. Four Justices, after acknowledging

that the scope of review under § 706 is limited and that the agency's conclusions *were supported by substantial evidence*, agreed with the reviewing court's action because "we cannot discover an expressed reason for permitting the railroads to reduce their services without showing that the rates they propose to maintain are reasonable rates for the service they intend to provide." *Id.*, at 817.

In *Atchison*, the exact § 706 standard under which the agency action was found to have been correctly set aside was not stated; but the arbitrary or capricious standard was the *only* test that *could* have been applied since substantial evidence was *conceded* and the remaining tests of § 706(2) were clearly inapplicable. Even if the agency action was not arbitrary, or capricious, or an abuse of discretion (and it may well have been), it was nonetheless "otherwise not in accordance with law."

Consolo v. *Federal Maritime Com'n*, 383 U.S. 607 (1966), cited by appellants, recognizes the separateness of application of the arbitrary or capricious standard and the substantial evidence standards for adjudicatory proceedings. The reviewing court based its decision solely upon its finding that the agency action was contrary to the "substantial weight of the evidence." *Id.*, at 618.[36] In reversing, this Court held that the reviewing court misunderstood the substantial evidence standard.[37] In so

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36. Because the reviewing court found the agency acted contrary to the substantial weight of the evidence, the reviewing court termed this error an abuse of discretion. The case at bar differs. The District Court found violation of the arbitrary or capricious standard because the agency action lacked a rational basis.

37. "In effect, the standard of review applied and articulated by the [reviewing court] in this case was that if 'substantial evidence' or 'the substantial evidence' supports a conclusion contrary to that reached by the Commission, then the Commission must be reversed. This standard is not consistent with that provided by the Administrative Procedure Act." 383 U.S., at 618-619.

holding, this Court emphasized the applicability of both the arbitrary or capricious standard *and* the substantial evidence standard when it quoted § 706 as the barometer for judicial review and itself placed "or" between the two standards.[38]

The separate functions of the two standards, as applied to the same agency action, findings and conclusions, were recognized in *Gilbertville Trucking Co.* v. *United States,* 371 U.S. 115 (1962), a case involving Commission disapproval, after hearing, of a proposed merger of motor carriers. The agency action was premised upon the finding and conclusion that the merger had in effect unlawfully taken place prior to the application. The District Court found the agency action both reasonable and supported by substantial evidence. This Court, in agreeing with the conclusion, held that its "review of this [agency] conclusion [was] limited to consideration of whether it [had] a *rational* basis *and* [was] supported by substantial evidence." *Id.,* at 126 (emphasis added). Thus, this Court separately applied both the arbitrary or capricious standard (rational basis) *and* the substantial evidence standard to the same finding and conclusion of the Commission.

This Court also set aside an ICC order, entered in an adjudicatory proceeding, for other than a lack of substantial evidence, in *Schaffer Transp. Co.* v. *United States,* 355 U.S. 83 (1957), a decision relied upon by private appellants. There, the Commission denied a motor carrier's application to provide service between points served exclusively by rail. The discretion invested in the Commission was recognized, but with the following caveat:

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38. This Court noted that §706 "gives a reviewing court authority to 'set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, [or] an abuse of discretion . . . [*or*] (5) unsupported by substantial evidence . . .'" 383 U.S., at 619 (additions in brackets by Court; emphasis added).

> "But that discretion must be exercised in conformity with the declared policies of the Congress. To see whether those policies have been implemented we look to the Commission's own summary of the evidence, and particularly to the findings, formal or otherwise, which the Commission has made. Just as we would overstep our duty by undertaking to evaluate the evidence according to our own notions of the public interest, *we would shirk our duty were we summarily to approve the Commission's evaluation of the record without determining that the agency's evaluation had been made in accordance with the mandate of Congress.*" *Id.*, at 88 (emphasis added).

The agency was found to have erred both in failing to make an evaluation of the "inherent advantages" of the proposed service, and in discounting testimony of witnesses supporting the application. It was held that "since the findings as to the adequacy of rail service do not provide this Court with a basis for determining whether the Commission's decision comports with the National Transportation Policy, that decision must be set aside. . . ." *Id.*, at 92.

The errors committed by the agency in *Schaffer* are in many respects similar to those of the agency in this case. The agency action was not set aside in *Schaffer* because of a lack of substantial evidence. As in *Atchison*, the standard under § 706 for which the agency action was set aside was not expressly stated; but the reasons given for setting aside the action clearly fall within the perimeters of the arbitrary or capricious standard.

As discussed *infra*, see pp. 42-43, § 706 merely restated the standards for judicial review in effect prior to enactment of the APA in 1946. In *McLean Trucking Co.* v.

United States, 321 U.S. 67 (1944), another decision relied upon by private appellants, one of the bases for challenging approval of carrier consolidations was an attack on an agency conclusion that, following consolidation, a certain carrier would not be affiliated with a railroad. This Court upheld the conclusion of the agency, not because it found the conclusion was supported by substantial evidence, but because it could not "find anything arbitrary or unreasonable in the conclusion. . . ." *Id.*, at 91. In *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475 (1942), the certificate of public convenience and necessity was set aside by the Court, not on the ground that the agency findings were not supported by substantial evidence, but because this Court found that the agency applied improper standards in its evaluation of the evidence. That "[t]he judicial function is exhausted when there is found to be a *rational* basis for the conclusions approved by the administrative body" was set forth in *Mississippi Valley Barge Line Co.* v. *United States*, 292 U.S. 282, 287 (1934) (emphasis added). And in *Silberschein* v. *United States*, 266 U.S. 221, 225 (1924), this Court held that agency action could be reviewed if it was "wholly unsupported by the evidence, or [was] wholly dependent upon a question of law, or [was] seen to be clearly arbitrary or capricious." Accord, *United States* v. *Williams*, 278 U.S. 255 (1929).

The foregoing demonstrates that for adjudicatory proceedings, this Court, in accordance with the clear and plain principles now embodied in § 706, has long recognized and applied the arbitrary or capricious standard as a separate standard of review.

C

The Legislative History of the Act Demonstrates Proper Application of Section 706

In applying § 10 of the APA, the District Court fully complied with the express language of the section and the intent of Congress, as reflected by the legislative history of the Act.

The content of the Administrative Procedure Act is the result of extraordinary, meticulous, "paintaking and detailed study and drafting." S. Doc. No. 248, 79th Cong., 2d Sess. 241 (1946) [hereinafter referred to as S. Doc. No. 248][39]; *id.*, at 190, 191, 301, 310, 349, 422.[40] "Intense consideration" of administrative procedure and the judicial review thereof consumed a period of more than ten years, with a plethora of bills being submitted and providing for, *inter alia*, varying forms of judicial review. S. Doc. No. 248, at 187; *id.*, at 63-66, 131-183, 298-302, 351-352.

The highlights of the enactment of the APA were: passage in 1940 of the Walter-Logan bill (H.R. 6324, 76th

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39. The document contains the legislative history of the APA subsequent to the filing of S. 7, 79th Cong., 1st Sess., on January 6, 1945. It contains: the text of the Act as passed; the Senate Judiciary Committee Print of June 1945, 79th Cong., 1st Sess.; Hearings Before The Committee On The Judiciary Of The House of Representatives On The Subject of Administrative Procedure, 79th Cong., 1st Sess., ser. no. 19 (1945); S. Rep. No. 752, 79th Cong., 1st Sess. (1945); H.R. Rep. No. 1980, 79th Cong., 2d Sess. (1946); and the proceedings in the Senate on March 12 and May 27, 1946, and in the House of Representatives on May 24 and 25, 1946. Citations concerning the APA's legislative history subsequent to January 1945, are to this document, in lieu of citation to individual Documents, Reports and the Congressional Record.

40. The extraordinary nature of the study and preparation given the Act is testified to by the following statement from the House Report, S. Doc. 248, at 241:

> "For more than 10 years this legislation has been under consideration. Certainly no measure of like character has had the painstaking and detailed study and drafting."

Cong., 1st Sess. (1939)), and its veto by President Roosevelt (H.R. Doc. No. 986, 76th Cong., 3d Sess. (1940)); the presentation shortly thereafter by a committee appointed by the Attorney General of a comprehensive report ("Administrative Procedure in Government Agencies," S. Doc. No. 8, 77th Cong., 1st Sess. (1941) [hereinafter referred to as S. Doc. No. 8]), containing majority and minority reports and proposed bills, all of which were closely studied by Congress (see S. Doc. No. 248, at 190, 192-193, 245-246); and following delay caused by World War II, the unanimous enactment of the APA in 1946, 60 Stat. 237. See S. Doc. No. 248, at 344, 406, 423; 92 Cong. Rec. 2167, 5668, 5791 (1946).

The Act was passed to satisfy "widespread demand." S. Doc. No. 248, at 187. A need and purpose must necessarily be demonstrated to secure the passage of any bill. This notwithstanding, Congress expressed an extraordinary need and concern for the legislation that culminated in the unanimous approval of the APA. Over a period of many years Congress voiced alarm at the tremendous growth of the Federal bureaucracy, and the concomitant flagrant abuse of agency authority. *E.g.*, 86 Cong. Rec. 4544, 4591, 13669, 13812 (1940); S. Doc. No. 248, at 382, 383. Buffeted by example after example of "absolutism,"[41] of agencies engaging in "autocratic, arbitrary, unreasonable and illegal exercises of authority,"[42] and of agencies abusing the discretion vested in them,[43] intensive Congressional efforts of more than a decade to rectify the intolerable situation were rewarded with adoption of the APA. The fundamental purpose of the Act was to protect against bureaucratic ty-

41. *E.g.*, 86 Cong. Rec. 4539, 4724, 13662, 13669 (1940).

42. *Id.*, at 4591; *e.g.*, *id.*, at 4601, 13670, 13676.

43. *E.g.*, 84 Cong. Rec. 7076 (1939); 86 Cong. Rec. 4544, 13668 (1940).

ranny; to insure due process of law; to provide individuals with a day in court in order to provide them a means to assert their rights; to restore interpretation of law to the courts; to end the aforementioned administrative absolutism, abuses of discretion, and utilization of "autocratic, arbitrary, unreasonable and illegal" means; and to satisfy the crying need for uniformity both in agency proceedings and in judicial review of such proceedings.[44] In sum, the salutary purpose of the Act was to insure "government of law, rather than of men." S. Doc. No. 248, at 381; 86 Cong. Rec. 4539, 4650, 13811, 13813 (1940).

To accomplish this purpose, the APA was drafted to provide "an outline of minimum basic essentials," S. Doc. No. 248, at 193. It was "designed to afford parties affected by administrative powers a means of knowing what their rights are and how they may be protected," *ibid.* See also, *id.*, at 250. Cognizant of both the "widespread demand" and need for a clear statement of the boundaries of judicial review (see, *e.g.*, S. Doc. No. 8, at 210-212; S. Doc. No. 248, at 187), Congress in § 10 of the Act, 5 U.S.C. § 706, set "forth a simplified statement of judicial review designed to afford a remedy for every legal wrong." S. Doc. No. 248, at 193.

Prior to enactment, the question was *not* whether the APA would pass, *but solely* how it should be drafted. See *id.*, at 352. The content was what concerned Congress. In carefully and painstakingly drafting the Act, Congress looked to prior bills and studies (particularly the Walter-

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44. *E.g.*, S. Rep. No. 442, 76th Cong., 1st Sess. 5, 10, 14 (1939); H.R. Rep. No. 1149, 76th Cong., 1st Sess. 4-5, 8 (1939); 84 Cong. Rec. 7076, 7077 (1940); 86 Cong. Rec. 4537, 4538, 4539, 4544, 4591, 4593, 4601, 4646, 4647, 4648, 4650, 4672, 4673, 4724, 4736, 4737, 13662, 13663, 13665, 13667, 13668, 13669, 13670, 13672, 13673, 13675, 13676-13677, 13678, 13808, 13811, 13812, 13813, 13814, 13815 (1940); S. Doc. No. 248, at 193, 304, 312, 313, 318, 326, 327, 351, 373, 380, 382, 383, 384, 385.

Logan bill, and the reports of the Attorney General's Committee), *id.*, at 187-193, 241-250. The final text was the result of extraordinary discussion, analysis and revision.[45]

After the bill passed the Senate, further revision based upon analysis of "many suggested changes and alternative proposals" was made by the House Judiciary Committee. *Id.*, at 250.

The Walter-Logan bill, as passed, contained no provision comparable to the arbitrary or capricious standard of the APA.[46] The only segment even impliedly approaching the

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45. The Senate and House Reports document the careful drafting of the Act. The bill eventually enacted, S. 7, 79th Cong., 1st Sess. (1945), when introduced was a "revised and simplified" version of S. 2030, 78th Cong., 2d Sess. (1944). S. Doc. No. 248, at 190. S. 2030 was "[b]ased upon the studies and hearings in connection with prior bills on the subject" and was the result of "several years of consultation with interested parties in and out of official positions." *Ibid.* Following the introduction of S. 7 (and of the companion House bill, H.R. 1203, 79th Cong., 1st Sess. (1945)), "[a]n entire year . . . [was] spent alone in redrafting." *Id.*, at 246.

Such redrafting was initiated when, upon request by the chairmen of both Judiciary Committees, views and suggestions for improving the bill were submitted by governmental agencies and private parties. With the assistance of the Justice Department and private parties, these submittals were analyzed and the text of the bill revised. A Committee Print was issued by the Senate Judiciary Committee in May, 1945, comparing the original and revised text. *Id.*, at 248; see *id.*, at 11.

Following submission of the revised text to agencies, further comments were received in response. Hearings were held by the House Judiciary Committee on H.R. 1203 and other bills on the subject in June 1945; and in late June 1945 another Committee Print was issued by the Senate Committee following analysis of the latest suggestions and of the hearings then in progress. Following three more months of discussion with public and private organizations and analysis, a further revised S. 7 was reported out of committee in October 1945. *Id.*, at 248-249; see also, *id.*, at 190-191.

46. As reported out of Committee and passed by the House, § 5 of the Walter-Logan bill provided for reversal of an agency "decision" if, *inter alia*, "the findings of fact [were] clearly erroneous; *or* . . . the findings of fact [were] not supported by substantial evidence; *or* . . . the decision [was] not supported by the findings of fact; *or* . . . the decision [was] otherwise contrary to law." 86 Cong. Rec. 4669-4671, 4743 (1940) (emphasis added).

(Continued on following page)

arbitrary or capricious standard appeared in § 5, wherein reversal of an agency decision was required if it was "not supported by the findings of fact."

As compared to the Walter-Logan bill, the APA was drafted to contain "more comprehensive provisions for a judicial review for the redress of any legal wrong." S. Doc. No. 248, at 192, 244. It follows that one of the APA's "more comprehensive provisions" was the arbitrary or capricious standard.

The administrative procedure bill proposed by the majority report of the Attorney General's Committee contained no definitive scope of review. See S. Doc. No. 8, at 92, 191-202, 209. The minority, however, recognized the pressing need of "statutory direction" for judicial review, *id.*, at 209. Its proposed bill contained a provision providing for review of "findings, conclusions, and decisions in any case . . . regardless of the form of the review proceeding," and for consideration of, *inter alia*, "administrative action *otherwise* arbitrary or capricious." *Id.*, at 246-247 (emphasis added).

In comparison to the reports of the Attorney General's Committee, the Act was written to be "more complete than the solution favored by the majority . . . but less prolix and more definite than the minority proposed." S. Doc. No. 248, at 192. Thus, the arbitrary or capricious standard in the APA was not intended to have the indefinite and redundant role assigned the "otherwise arbitrary and capricious" provision in the bill proposed by the minority.

Footnote Continued—

The Senate Judiciary Committee amended § 5 by deleting the "clearly erroneous" and "contrary to law" standards. The deletions were ratified by both the Senate and the House. 86 Cong. Rec. 13676, 13746, 13748, 13807-13808, 13816 (1940).

The arbitrary or capricious provision in the bill as drafted (S. 7, 79th Cong., 1st Sess. (1945)), as reported out of committee (S. Doc. No. 248, at 222), and as passed by the Senate, included reversal for agency abuse of discretion solely by implication.[47] "To make it clear that . . . [the bill] preserve[d] judicial review of abuses of discretion," the "abuse of discretion" ground was written into the bill by the House Judiciary Committee. S. Doc. 248, at 289, n. 22.

Congress foresaw an active, substantive role for the courts. The Senate Report admonished that the provisions of the Act "require[d] vigilant attention to assure their proper operation." *Id.*, at 217. Noting that the Act was generally "one laying down definitions and stating limitations," it was further recognized that "the enforcement of the bill, by the independent judicial interpretation and application of its terms, is a function which is conferred upon the courts in the final analysis." *Ibid.*

In promulgating the six separate standards for review in § 10(e) of the Act, including the arbitrary or capricious standard, as the tools for courts to use in such "vigilant" enforcement, Congress made no exception for the use of those six review provisions. This conclusion is compelled by a mere reading of the plain, clear, and separate standards set forth in § 10(e).

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47. Section 10 of the Act provides for judicial review of agency action except where precluded by statute or where "committed to agency discretion." On the floor of the Senate, Senator Donnell noted that as the bill was then written, some might feel that there could be no judicial review for abuse of discretion. The sponsor of the bill, Senator McCarran, assured the Senate that unauthorized, capricious, or arbitrary employment of discretion was subject to review. S. Doc. 248, at 310-311. As noted in the text *infra*, reversal for "abuse of discretion" was written into the bill by the House Judiciary Committee.

Moreover, the Reports of both the Senate and House Committees speak of "the *several* categories of questions of law" listed in the subsection. S. Doc. No. 248, at 214 and 278 (emphasis added). In addition, the desired application and enforcement of all six separate standards as "plainly" and "clearly" written was made quite clear both in the Reports accompanying the bill and on the floor of Congress.[48]

Looking to the purpose of the Act and to the extraordinary, meticulous, painstaking, and careful preparation given it, it is obvious that Congress intended the arbitrary or capricious standard to serve a definite, separate, viable function in the overall scheme of judicial review. There is not the faintest whisper in the legislative history that the arbitrary or capricious standard was to have either a restricted function or to operate only with respect to certain matters. On the contrary, Congress specifically and expressly sought to cure that forbidden agency action falling within the boundaries of the standard. For example, on the floor of the Senate, Senator McCarran emphasized that "the thought uppermost in presenting this bill is that where an agency

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48. For example, the Senate Report, S. Doc. No. 248, at 193, stated that "[t]he jurisdiction of the courts is clearly stated." And the House Report provided that "[t]he bill is meant to be operative 'across the board' in accordance with its terms, or not at all." *Id.*, at 250.

In discussing the six standards of § 10 of the bill in the Senate, Senator McCarran stated courts were to set aside action "found to be arbitrary *or* contrary to the Constitution *or* contrary to the statutes *or* short of statutory right," etc. *Id.*, at 323-324 (emphasis added). On the floor of the House of Representatives, Congressman Walter showed the standards to be separate, *id.*, at 370, as did Congressman Gwynne, *id.*, at 375.

Senator McCarran stated that the bill had been given "meticulous" study, so that its terms would be construed "in such a way that there may be no divergence of views when we get through." *Id.*, at 310. And Congressman Hobbs "pray[ed] that the plain meaning of . . . [the bill would] be so correctly interpreted as to effectuate its high purpose." *Id.*, at 382. See also, *id.*, at 381 (Hobbs).

without authority or by caprice makes a decision, then it is subject to review." S. Doc. No. 248, at 310. Moreover, Congressman Walter, long a proponent of the bill, stated that "the function of an . . . agency is clearly not to decide arbitrarily or to act contrary to the evidence or upon surmise or suspicion or untenable inference." *Id.*, at 365. Stating that agencies must reach "just" decisions upon the whole record, he noted that agencies "do not have authority in any case to act blindly or arbitrarily." *Ibid.*

Nor was the need for, or purpose of, the arbitrary or capricious standard ever questioned or challenged. As heretofore shown, Congress instead bolstered the standard as originally written by adding the "abuse of discretion" ground for reversal. Had Congress intended the arbitrary or capricious standard to have the narrow, "generic" function ascribed to it by the appellants, Congress would clearly have done so. The extraordinarily careful study and meticulous drafting, and the length of preparation prohibit any other conclusion.

There is no specific explanation of the arbitrary or capricious standard in the reports of the Senate and House Judiciary Committees, save for the aforementioned reason given in the House Report for why the term "abuse of discretion" was added to the arbitrary or capricious standard. But on the floor of Congress, in the only critique of the standard, it was praised by Congressman Springer, a member of the Judiciary Committee, as "a most potent statement and a fair and equitable provision. . . . [I]n those cases where . . . decisions are found to be arbitrary, where the decision is found to be capricious or an abuse of discretion or otherwise not in accordance with the law, the decision can be set aside. That is certainly fair, that is certainly

equitable, and that is certainly based upon a sound philosophy." S. Doc. No. 248, at 377.[49]

Included in the scope of judicial review prior to statutory regulation of such review, and expressly noted by Congress, was the rule that, among other grounds, an agency decision could be set aside if it was either "arbitrary or capricious or unsupported by evidence." S. Doc. No. 145, 76th Cong., 3d Sess. 19 (1940). The employment of the arbitrary or capricious standard in the APA was therefore simply the intentional restatement by Congress of one of the accepted standards of judicial review of agency action, as understood by Congress; and the other standards set forth in 5 U.S.C. § 706 were generally felt by Congress to be those that were employed for judicial review prior to the passage of the Act. S. Doc. No. 248, at 39, 86, 224, 230, 289, at n. 22, 415. But Congress clearly intended one fundamental change in the practice that had been utilized by some courts. Whereas, some courts in reviewing agency action had not looked to the whole record, Congress prescribed that review *must* be based upon the entire record, or those portions cited to the court. *Id.*, at 216-217, 279. This important change was expressly recognized on the floor of Congress. *Id.*, at 248, 280, 321-322, 375, 376.

Congress did not provide that a court upon reviewing the record could reverse only if a decision was "unsupported by substantial evidence," or *only* if a decision was *both* unsupported by substantial evidence *and* was arbitrary or capricious. Congress plainly provided that a decision could be reversed if it was, among other things, ar-

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49. As discussed in n. 47, *supra*, the standard was indirectly discussed by Senator McCarran. Prior to the addition of "abuse of discretion" to the arbitrary or capricious standard, he assured the Senate that discretion employed in an unauthorized, capricious or arbitrary manner was subject to review. S. Doc. No. 248, at 310-311.

bitrary, *or* capricious, *or* an abuse of discretion, *or* otherwise not in accordance with law, *or* unsupported by substantial evidence. Congress clearly intended that a decision be reversed for any one of several reasons. The Senate and the House Reports for the APA, in discussing the scope of review for reversal, *vel non*, of "agency action, findings and conclusions," provided that the terms " 'finding' and 'conclusion' also mean failure to find or conclude as the law and record may require. . . ." S. Doc. No. 248, at 214, 278. They also provided that "[t]he requirement of review upon the 'whole record' means that courts may not look only to the case presented by one party, since other evidence may weaken or even indisputably destroy that case." *Id.*, at 248, 280.

Without question, a "failure to find or conclude as the law and the record may require" is arbitrary or capricious action, mandating reversal; as is looking "only to the case presented by one party." These are the types of agency errors found by the reviewing court to constitute arbitrary and capricious action. The court also found abuse of discretion. In reversing the Division, the District Court was conscientiously complying with the express provisions of the APA and the clear intent of Congress.

D

The Reviewing Court Did Not Weigh the Evidence

The Government contends that the reviewing court "set aside the Commission's decision because it believed the evidence presented by appellees was entitled to greater weight than the Commission accorded to it" (Brief 13). It also contends that the District Court "invalidated the Commission's order, notwithstanding the abundance of evidence supporting the Commission's findings, because the court

disagreed with the Commission's evaluation of some of the contrary evidence" (*Id.*, at 15). The private appellants contend (Brief 16) that the District Court reviewed *"de novo"* the decision of the Division,[50] and that the court's decision "requires the Commission to accord equal weight" to all evidence presented (*Id.*, at 42).[51]

Appellants' contentions do not correctly describe either the court's action, or the import of its decision. The court went no further than concluding, as a matter of law, that the Division's treatment of the evidence was not proper. In holding that "there is no rational basis for the Division's consideration of such evidence presented by applicants and its refusal to consider such evidence presented by protestants" (App. 1311), *the court was not itself weighing such evidence.* If this constitutes "weighing the evidence," as

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50. Private appellants use the term "de novo review." The term is inapposite. It appears in the Bank Merger Act of 1964 where the term "review de novo" was used to reach the same result as "trial de novo." *United States* v. *First City National Bank*, 386 U.S. 361, 368 (1967). In *Overton*, the Court stated that agency action subject to § 706(2)(F) requires the reviewing court "to engage in a de novo review of the action." There, the Court was again using the term to apply to proceedings subject to "trial de novo by the reviewing court." 401 U.S., at 414.

51. The private appellants also make the pro forma argument that "the District Court substituted the clearly erroneous rule for the substantial evidence rule" (Brief 21). The contention has no application to this case. This "clearly erroneous rule" finds its basis in Rule 52(a) of F.R.C.P., which provides that "findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." See *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948). The reviewing court recognized its limited scope of review and acted accordingly. The reasons presented to show that the District Court did not "weigh" the evidence also compellingly demonstrate that the court did not utilize a "clearly erroneous" rule. The court was solely concerned with § 706 questions of law. The court did not set aside findings of fact made by the Division. The court found, as a matter of law, that the conclusions and action of the agency based upon the agency's own findings of fact were improper.

charged by appellants, judicial review would be a futile formality.

In performing its function of review, the District Court was called upon to decide whether the Division acted arbitrarily or capriciously, and therefore without rational basis, in applying different standards in its treatment of the evidence—a far cry from "weighing the evidence" or "de novo" review of the issues presented. The court found, as a matter of law, that the Division had applied a discriminatory double standard in its treatment of protestants' evidence as contrasted to its treatment of applicants' evidence, and specifically enumerated those errors of law. The court summarized the Division's error (App. 1319):

> ". . . In applying different standards to evidence presented by applicants as contrasted with evidence presented by protestants, and in some instances to the same evidence, the report sounds more in advocacy than in impartial adjudication. . . ."

Stated differently, such action on the part of the Commission "was an exercise of arbitrary power, at variance with 'the rudiments of fair play' long known . . . to our law. The Fourteenth Amendment condemns such methods and defeats them." *West Ohio Gas Co.* v. *Public Utilities Comm'n*, 294 U.S. 63, 71 (1935).[52]

Set forth in Appendix II hereto are findings of the District Court of arbitrary or capricious action by the Division in its treatment of the evidence. The mere recital of these examples demonstrates that the District Court did not engage in "weighing of the evidence" or "de novo" review of the issues presented. Clearly, they demonstrate er-

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52. Here, the reviewing court concluded that "[t]he basic rudiments of fairness were simply not applied" (App. 1314).

rors of law. A brief description of some of these errors are set forth below:

1. Protestants' Transit-Time Studies v. Those Of Applicants

A. The Division Report: The Division concluded that the protestants' transit-time studies "do not present as valid a picture as those introduced by those witnesses supporting the applications" on the stated grounds "(1) that most either relate to short periods of time or cover traffic handled for specified shippers and (2) that they were made when protestants were confronted with the possibility of grants of authority to additional carriers . . . ." (App. 129).

B. *The Court's Findings*: The District Court found "[t]here is no rational basis for the Division's refusal to give weight to the extensive transit-time studies presented by protestants. These studies constituted the most important part of protestants' evidence and collectively reflected their service on more than 120,000 shipments . . . ." (App. 1310). The court also found "[t]he conclusion that these studies are entitled to little weight because they 'relate to short periods of time' is completely arbitrary" because "[m]any covered longer periods of time than those presented by applicants and others covered periods identical to the applicants'. The Division's reliance upon the applicants' studies and its refusal to rely upon protestants' studies constitutes arbitrary and capricious action" (App. 1311).

The District Court found that the rejection by the Division of the protestants' traffic studies "on

the ground that they cover periods of time subsequent to the filing of the applications is also without rational basis" because the Commission "made specific findings in favor of applicants based on applicants' studies that covered similar or later periods of time," and concluded that "[a]gain, one standard was applied to applicants and a different standard to protestants" (App. 1311).

The District Court found that the Division's "condemnation of protestants' studies on the ground that some 'cover traffic for specified shippers' is particularly unwarranted" because the "applicants placed in issue the quality of service rendered by specific carriers to specific shippers by presenting such shippers as witnesses" and the protestants "presented shipping documents taken from their files evidencing specific service rendered *for those same shippers*" (App. 1311) (emphasis added).

The court concluded that "there is no rational basis" for the Division to consider "such evidence presented by applicants and its refusal to consider such evidence presented by protestants" (App. 1311).[53]

2. Applicants' Transit-Time Studies—Parts Favorable To Applicants v. Parts Unfavorable To Applicants

A. The Division Report: At one point in its report the Division made critical findings favorable

53. Private appellants charge the court with improperly finding that the Division compared protestants' studies with those "presented by Applicants," saying that the comparison was made only with the "studies of supporting shippers" (Brief 40). This is a frivolous play on words. All "studies of supporting shippers" were "presented by Applicants" since applicants sponsored the witnesses who presented the studies.

to Bowman, based upon Bowman's service exhibit (App. 116); but at a subsequent point the Division refused to consider those parts of the identical exhibit unfavorable to Bowman (App. 157).

B. The Court's Findings: The District Court found that "Bowman and Johnson both presented transit-time studies for the declared purpose of demonstrating their ability to perform in accordance with their proposals," and that the Division "accepted applicants' evidence as substantiating applicants' ability to perform as proposed" (App. 1295). It also found that protestants pointed out to the Division that the Bowman service exhibit showed that in many instances Bowman "delivered its traffic on time only 55% of the time" and that "Johnson's on-time performance ranged from 22.5% to 58.5%," and that "[t]hese facts were ignored by the Division" (App. 1296-1297).

The court concluded that "[w]hile predicating findings, favorable to applicants, upon applicants' traffic studies, the Division refused to consider those portions of the same exhibits reflecting unfavorably upon applicants," and that "the Division's refusal to consider those portions unfavorable to applicants clearly lacks a rational basis" (App. 1312-1313).

3. Supporting Shipper Service Exhibits—Parts Favorable To Applicants v. Parts Unfavorable To Applicants

A. The Division Report: The Division made essential findings favorable to applicants based upon shipper-sponsored traffic studies (App. 126). No mention was made, however, of the composite sum-

maries of such exhibits which demonstrated that, viewed in their entirety, they supported protestants' rather than applicants' position (Exhibits 1839, 1840, 1841, 1942, summarized in Appellees' Initial Brief in District Court, at 123-127).

B. The Court's Findings: The court concluded that this action constituted "arbitrary treatment" by the Division in that it "predicated essential findings upon portions of traffic studies, presented by applicants' shippers, favorable to applicants, but refused to consider comprehensive summaries of identical studies compiled by protestants and relied upon by protestants to demonstrate that applicants' own exhibits, viewed in their entirety, showed performance by protestants superior to that of applicants as well as reasonably adequate protestant service" (App. 1313).

4. Service Restrictions By Applicants v. Service Restrictions By Protestants

A. The Division Report: The Division condemned protestant carriers for imposing service restrictions in published tariffs (App. 126-127). Yet, many similar, and sometimes identical, restrictions were maintained at the same time by applicants Bowman, Johnson, and Red Ball.[54] Although condemning protestants for the described types of service restrictions, the Division's report did not even mention the same or similar type service restrictions maintained by applicants.

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54. These restrictions were contained in official tariffs filed with the Commission, and were called to the Division's attention by protestants in Ex. 1664, Apps. 40, 44 and 46. A summary appears in appellees' initial brief in the District Court, at 131-133.

B. The Court's Finding: The District Court found that the Division's report "specifically condemned certain protestants for promulgating tariff or service restrictions while refusing to mention identical restrictions promulgated by Red Ball, Bowman, and Johnson" (App. 1297). The court concluded: "Again, the identical type of evidence was relied upon by the Division when favorable to applicants and ignored when adverse to applicants." (App. 1313).

5. "Official Notice" Of Facts Detrimental To Protestants v. Refusal Of "Official Notice" Of Facts Detrimental To Applicants In The Same Publication

A. The Division Report: On its own motion, the Division took official notice of the Fall 1971 Edition of the American Motor Carrier Directory for the purpose of showing that protestant Cole-Dixie had closed one of its terminals since the hearing (App. 151, n. 42).

In selecting Red Ball as one of the applicants to which authority was granted, the Division relied heavily upon the fact that Red Ball maintained 92 terminals (App. 132).

Although requested to do so by protestants, the Division refused to take official notice of the same edition of the same publication which showed that Red Ball had closed 35 of its 92 terminals.

B. The Court's Findings: The court found that "[o]n its own motion, the Division took official notice of an industry publication which revealed that one terminal described in a protestant's evidence had been closed subsequent to the hearing.

> At the same time, the Division placed emphasis upon the large number of terminals maintained by applicant Red Ball. Since the same industry publication cited by the Division also revealed that many of Red Ball's terminals had been closed subsequent to the hearing, the Division should have noted that its findings as to Red Ball were substantially incorrect. Most certainly the Division should not have relied upon information in the publication favorable to an applicant while refusing to consider those portions of the same publication reflecting unfavorably upon an applicant. . . . The basic rudiments of fairness were simply not applied" (App. 1298, 1314).

The above examples illustrate the court's findings and conclusions.[55] Clearly they demonstrate that the court did not "weigh the evidence." The court found, as a matter of law, that the Division's action, findings and conclusions were arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law.

III

Other Deficiencies in the Division's Decision

The reviewing court noted other substantial deficiencies in the Division's decision, not previously discussed. They include the following:

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55. They are by no means exhaustive. For example: "Other evidence presented by applicants' shippers received similar treatment by the Division. Findings of the Examiners, and findings embodied in an appendix to the Division's report, reflecting unfavorably upon applicants received emphasis by the Examiners but no consideration by the Division" (App. 1313-1314).

A

The Court Properly Held That the Commission Failed to Give Consideration to the Total Carrier Service Available at the Time of Its Decision

One of the most egregious errors in the Division's report is the absence of any evaluation of the total carrier service available at the time of its decision. The fundamental issue involved the adequacy of existing service. The applications were filed in 1965. The hearing ended in 1967. The Division served its report in early 1972, and its final two-to-one vote approving the applications was dated September 1, 1972 (App. 101, 363).

In its report the Division ruled that three additional carriers were needed to supplement the existing service and, further, that *more than three would be detrimental to the public interest* (App. 131). At no point, however, did the Division make any analysis or evaluation of the total service available at the time of its decision (App. 1299, 1314). The applicants based their proposals primarily on the proposition that there was not a sufficient quantity of *single*-line service available and that the abundant *joint*-line service available could not adequately meet the needs of the public due to the inherent disadvantages of joint-line operations.[56] The Division's only evaluation of the total service available appears in its summary of evidence presented by Johnson: "comparatively there is a paucity of single-line motor carrier service available to meet the demonstrated growth." This finding was followed immediately by a correlative finding: "In this re-

56. "Joint-line" service embraces all types of movements where two or more carriers are involved, including the widely prevalent practice by which carriers exchange trailers in order that shipments may move in through, coordinated service without physical handling en route.

spect it is noted . . . that on the whole the population . . . has increased substantially between 1960 and 1970" (App. 122-123).

It is significant that this, the only evaluation of total service available, was made for the purpose of testing the adequacy of such service "to meet the demonstrated growth" in the involved areas. The problem with this is that the Division's conclusion that "comparatively there is a paucity of single-line service available" was based upon a study made prior to the start of the hearing in March of 1966.[57] This *1966* status was then used to determine its adequacy "to meet the demonstrated growth" that had taken place through *1970*. Ignored were the tremendous changes in available service that resulted from post-hearing grants of new authority, mergers, and consolidations approved by the Commission.[58]

Contrasting sharply with the Division's treatment of this subject is the examiners' detailed analysis of service available at the time their report was issued in 1969 and their evaluation that a "multiplicity" of such service existed (App. 871-872, 883-884).

Following issuance of the examiners' report, additional changes occurred, but the Division consistently ignored them. They also ignored the changes considered in the examiners' evaluation and, instead, concluded that the ap-

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57. Exhibit 62; summarized, in part, in appellees' initial brief in the District Court, at 141-145.

58. These comments consider only the expansion in *carriers* available and do not give effect to each carrier's increase in vehicles operated. For example, in the lower court appellant Lorch supplied statistics showing that during 1960-1971 for-hire truck registrations in the southwest increased by 70 percent and in the southern area by 88 percent (Lorch Brief 427). The examiners recognized that existing carriers "have increased their facilities and services with the growing needs of shippers in the areas they serve" (App. 889).

plications should be granted because of the "paucity" of service that was available in early 1966.

The significance of these changes is demonstrated by the following examples:

SINGLE-LINE[59] SERVICE AVAILABLE

Between Atlanta and	At time of Hearing	At time of Examiners' Report	At time of Division's Report
Dallas	3	7	13
Houston	3	7	11
Jackson	3	6	8
Kansas City	5	5	10
Baton Rouge	1	(Not Shown)	7

After recognizing its duty to give consideration to such changes and the propriety of taking official notice of its records reflecting such changes, the Division stated that "accordingly" changes involving *protestants* "have been noted in appendix G" and changes involving *other carriers* "although not specified in detail in this report, have nevertheless been accorded full and careful consideration in our present determination"[60] (App. 106). These recitals appear in a section entitled "Preliminary Matters," but in its "Dis-

59. This comparision does not include the multiplicity of *joint*-line motor and rail service available. A more comprehensive analysis appears on pages 142-145 of appellees' intitial brief before the District Court.

60. The Division's assertion that facts not placed in evidence nor made the subject of official notice had "nevertheless been accorded full and careful consideration" constitutes legal error. "Facts conceivably known to the Commission, but not put in evidence, will not support an order." *Baltimore & O.R. Co.* v. *United States* ("The Chicago Junction Case"), 264 U.S. 258, 263 (1924). "All parties must be fully apprised of the evidence submitted or to be considered. . . ." *ICC* v. *Louisville & N.R. Co.*, 227 U.S. 88, 93 (1913).

cussion and Conclusions," the Division *made no evaluation of the total service then available.* The reviewing court therefore noted that the Division's preliminary recital that it had given "full and careful consideration" to these matters "cannot be accepted as a substitute for adequate findings." In view of the Division's refusal to evaluate the total service available at the time of its decision, the court concluded that it "cannot discern any rational basis for the Division's conclusion that three additional carriers are needed to meet the needs of the shipping public" (App. 1314).

Appellants cite fragmented references in the report, and aver that the Division did, in fact, consider post-hearing changes (Government Brief 28, 34-35; Priv. App. Brief 40, 57-58). Their citations identify specific references to post-hearing changes appearing (a) in the body of the report, (b) in an appendix relating to protestants, and (c) in an appendix summarizing the pleadings.

The references to the *pleadings* do not, of course, constitute findings of fact.[61]

The references to changes involving protestants, set forth in the appendix, were not mentioned, much less considered, in the body of the report.[62]

The references in the report itself identify post-hearing expansions involving *applicants*—facts favorable to the

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61. Justice Cardozo pointed to the impropriety of using averments as a substitute for findings, stating: ". . . they are not a finding at all, but a summary of the grounds of protest, an outline of the pleadings, or what amounts to the pleadings, before an administrative body." *Mississippi Valley Barge Line* v. *United States*, 292 U.S. 282, 289 (1934).

62. "At no point in its report, however, does the Division evaluate the effect of this expanded service. More significant is the Division's failure to make any comprehensive evaluation of the scope or extent of all carrier service available at the time of its decision" (App. 1299).

applicants. Only one such reference mentions protestants, that being a completely unwarranted conclusion that the post-hearing merger of protestants United and Campbell resulted in "rendering the issue as to the vulnerability of the former's operations moot"—a conclusion favorable to applicants (App. 157, n. 44). The Commission ignored the true impact of the United-Campbell merger which changed the joint-line service of those protestants into a new single-line service between Atlanta and most of the key cities involved.[63]

It is not possible to read the Division's report and discern therefrom the fact that the Atlanta-Dallas single-line carriers had increased from 3 at the time of the hearing to 13 at the time of the decision. If the Division, in the exercise of its expertise, deemed 3 (in 1966) to constitute a "paucity," it should have explained why it did not agree with the examiners that 7 (in 1969) constituted a "multiplicity," or why 13 (in 1971) were not sufficient. When the Division concluded that 3 more were needed, and that 4 more would be excessive, the report would indicate that it was thereby increasing the total from 3 to 6, whereas, in fact, it was authorizing an increase from 13 to 16.

Since this involved such a basic issue, it is difficult to understand how such an obvious error could be made. Per-

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63. In discussing a different point, the Government also refers to a post-hearing change in appellee Braswell's operations, quoting from a finding in the report that Braswell's "authority in Alabama is limited to only the major points of Birmingham and Montgomery" (Brief 25-26, n. 11). Here, Government counsel inadvertently engages in the identical type of "advocacy" followed by the Division. This *erroneous* finding, relied upon by the Division in its report (App. 152), is in direct contradiction of the more detailed finding buried in the appendix devoted to protestants. There, the Division *adopted* the examiners' *correct* finding that Braswell's new authority embraces *all points* on two routes completely traversing Alabama, with service at "141 points in Mississippi, Alabama and Georgia" (App. 354, n. 17; 1265-1266, n. 10).

haps undue reliance was placed upon applicants' briefs and pleadings. In their *final brief* before the Commission applicants argued that the case "can and should be decided on the basis of the record as it now stands" and that since "there is no evidence on this record" concerning operations pursuant to post-hearing certificates and mergers, such changes should be disregarded.[64] At the same time, applicants successfully opposed appellees' efforts to reopen the proceedings for proof of service rendered under new authority.[65]

Also, in its final brief before the Commission, Johnson continued to assert the position it assumed at the outset of the hearing that "Ryder and Roadway are the only single-line Johnson protestants having significant service between points Johnson proposes to serve and points in its present territory. . . ." Indeed, in its Jurisdictional Statement, Johnson quoted excerpts from its exceptions before the Commission that:

> "The only protesting carriers having significant single-line service in the areas presently and proposed to be served by Johnson are Ryder and Roadway" (J. S. Johnson, A-4).

Certainly, Johnson would not have this Court gain the erroneous impression that Ryder and Roadway are the only "protesting carriers having significant single-line service in

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64. See, *e.g.*, Johnson's Reply to Petitions for Reconsideration, at 63.

65. See, *e.g.*, Replies to Petitions for Further Hearings filed by Bowman, dated April 30, 1969 and April 1, 1972, by Johnson, dated April 21, 1969, and by Red Ball, dated April 18, 1969. The examiners and the Division overruled appellees' repeated efforts to have the proceeding reopened for proof of changes in service available. Both reports explained that reopening was not necessary since official notice would be taken of such changes (App. 898, 106).

the areas presently and proposed to be served by Johnson."[66] These applicants propose, for example, to duplicate the present service between Atlanta and Dallas, Houston, Jackson and Baton Rouge, and thereby become the 16th, 14th, 11th and 10th single-line carriers, respectively, between such points.[67]

The conclusion is inescapable that the two-to-one vote of the Division in this case *did not result from the exercise of an informed, impartial judgment applied to facts placed in evidence or officially noted!*

B

The Court Correctly Found That the Commission Did Not Give Proper Consideration to the Adverse Effect of the Grants upon Existing Service

The Court properly noted that "[t]he Examiners concluded . . . that approval of *any* of the applications would result in a *deterioration* rather than an improvement of existing carrier service, contrary to the public interest" (App. 1280) (emphasis added). The Division, on the other hand, found that "protestants have not shown that they would be seriously adversely affected by such grants" (App. 157). The examiners' findings of fact relating to

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66. Johnson's reference embraces only "*protesting* carriers," but protestants to the Johnson application include 7 *other than* "Ryder and Roadway" that provide "significant single-line service," for example, between Atlanta (presently served by Johnson) and Dallas (proposed to be served by Johnson) (App. 324, 329, 332, 338, 341, 342, 354). Other "protesting carriers" providing similar service between such points also opposed the Bowman and Red Ball proposals to duplicate such service (App. 321, 326, 346).

67. Private appellants complain (Brief 57, 58) because certain *appellees* "received additional common carrier authority during the pendency of this proceeding as late as 1970," but the Commission should not be concerned with who received the authority as long as the public is served.

this issue were expressly adopted by the Division[68]; accordingly, the Division and the examiners relied upon identical facts to reach opposite conclusions. Based upon its study of the two reports, the court found that the Division's "conclusion is directly contrary to the Division's findings of fact . . ." (App. 1316).

In challenging this finding by the reviewing court, the private appellants base their argument on a serious misrepresentation of the facts. They state that "the examiners . . . found such adverse effect only if all 10 applications were granted" (Brief 48). The facts are that the examiners *repeatedly* found that approval of "*any*" or "*any one*" of the applications would cause deterioration in existing service, thereby adversely affecting the public interest (App. 889-892). Since this error constitutes the only basis for such appellants' criticism of this finding by the reviewing court, their argument merits no further discussion.

The Government makes the same error (Brief 5). It also points to the Division's finding that "only one carrier, Holloway, had shown that its operations may be seriously affected"[69] (Brief 33). The Government argues that the Division's determination of this issue should not be disturbed since the only evidence detracting from such determination was the Commission's finding "that a loss of any of Roadway's eastbound traffic from Texas origins would result in a further imbalance in its operations (App. 345) and that a diversion of freight from Campbell's terminal points would result in deterioration of Campbell's ser-

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68. These findings appear in Appendix D to the examiners' report (App. 1191-1269), brought forward verbatim in the Division's report as Appendix G (App. 319-358).

69. The examiners used appellees Holloway and Red Line as examples of small carriers that would be "put out of business" if only *one* of the applications were granted (App. 889-890).

vice at smaller points in Mississippi (App. 339)..." (*Ibid.*). There is simply no way to explain why the Government, in acknowledging this conflict between the Division's findings and its conclusions, referred *only* to the findings as to Roadway and Campbell. *Almost identical findings* were made by the Division as to Alamo (App. 323), Missouri Pacific (App. 328), Gordons (App. 330), Mercury Motors (App. 332), West (App. 335), Deaton (App. 335), Floyd & Beasley (App. 376), Pilot (App. 338), Mason and Dixon (App. 338), East Texas (App. 342), Transcon (App. 343), Herrin (App. 346), ET&WNC (App. 347) and United (App. 348).[70] Specific examples of some of these findings are quoted in Appendix III hereto.

Since *none* of these findings are mentioned in the Division's discussion of the case, and since they are in direct conflict with the Division's conclusion, the reviewing court correctly found, as a matter of law, that the Division's conclusion was not lawful since it was "directly contrary to the Division's findings of fact" (App. 1316).

IV

The Reviewing Court's Decision Is Not Deficient in Any Other Respect

Although appellants criticize various statements appearing in the reviewing court's opinion, such criticisms are not well founded. In many respects they illustrate the

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70. Similar findings were also made as to ICX (App. 322), SW Transp. (App. 322), Central (App. 323), Red Arrow (App. 323-324), T.I.M.E.-DC (App. 763-764), Yellow [Watson-Wilson] (App. 326), Trans-Cold (App. 327-328), Red Line (App. 328-329), Southern Forwarding (App. 331), Mid-South (App. 331), Wilkerson (App. 331), Atlas (App. 331-332), Akers (App. 332), Mercury Freight (App. 333), Howard Hall (App. 334), Baggett (App. 336), GFA (App. 337), Cole-Dixie (App. 340), Brown (App. 341), Ryder (App. 350) and Braswell (App. 354-356).

probing nature of the court's in-depth study of the record, and in no respect do they establish any deficiency in the court's analysis of the agency action.

The principal criticisms advanced by appellants, not previously discussed, will be considered.

A

The Reviewing Court Did Not, As Charged by Appellants, Invalidate the Agency Order Because the Record Was "Stale"

Another misstatement of the record appears on page 54 of the private appellants' brief. They say that the reviewing court invalidated the agency order because "the record was 'stale.'" To support this charge they quote from the court's *October 4, 1973* opinion which did not deal with the merits but with the Government's motion to amend judgment. They erroneously attribute such quotation to the *September 11, 1973* opinion on the merits. In neither opinion was the quoted term "stale" used by the court. More importantly, the court did *not* find that the Division erred in rendering its decision on a "stale" record. *After* finding the agency's action invalid for the many reasons discussed, the court specified the age of the record as one of several reasons why remand for further proceeding on the present record would impede rather than facilitate the Commission's further consideration of the issues of public convenience and necessity.[71] See *infra*, p. 63. *et seq.*

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71. See App. 1319, para. 29; App. 809-823.

B

Private Appellants Improperly Charge the Reviewing Court with "Mechanically Adopting Verbatim" Appellees' Proposed Findings

In their Jurisdictional Statements the private appellants charged the reviewing court with "mechanically adopting verbatim the proposed findings and conclusions of one set of parties. . . ."[72] Jurisdiction was *not* noted as to this issue; however, such parties continue to argue, both expressly and by innuendo, that the court improperly adopted appellees' proposed findings and conclusions.[73] During oral argument all parties agreed to submit proposed findings of fact and conclusions of law (App. 571, 580, 581, 856, nos. 75, 77).[74] The court considered them all and, in its opinion, adopted appellees' after finding them to be "correct" (App. 1282).[75]

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72. See question no. 1, Jurisdictional Statements of Lorch, at 3-4; Bowman, at 3-4; Johnson, at 3; and Red Ball, at 2-3.

73. *E.g.*, brief of private appellants, at 5, 10, 12, 20, 26, 34, 37-38.

74. This procedure was consistent with local practice; the Federal Rules of Civil Procedure; orders of the court; the guidelines of the Eighth Circuit set forth in *Bradley* v. *Maryland Casualty Co.*, 382 F.2d 415, 423 (1967); and holdings in *United States* v. *Crescent Amusement*, 323 U.S. 173 (1944), and *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651 (1964). Although appellees submitted proposed findings and conclusions (App. 697), private appellants submitted fully drafted opinions for signature by the judges (App. 615, 645, 647, 695).

75. The court wrote its own opinion rather than "mechanically adopting verbatim" appellees' proposals, as improperly charged by private appellants. *E.g.*, appellees proposed a single sentence recording the court's refusal to review *Jones* (App. 699); the court wrote over five pages (App. 1320-1325). The court's independent research is reflected by its quotation from, and citation to, cases not quoted or cited in appellees' proposals and by the changes it made in appellees' proposed conclusions (App. 1306-1307, 1308, 1320).

In continuing, improperly, to argue this "issue," private appellants cite *Ayrshire Collieries Corp.* v. *United States*, 331 U.S. 132, 138 (1947), and make the unwarranted assertion that the court below "missed the very essence of the judicial function in this case—the actual adjudication of the issues of law and fact" (Brief 37). *Ayrshire* is inapplicable. It involved the propriety of a decision by two judges of the three-judge panel, one judge being ill and unable to participate. *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 169 (1962), is also inapplicable. The "counsel's discretion" referred to therein was "appellate counsel's *post hoc* rationalization for agency action," and was properly ignored by the Court. All of the other assertions by such appellants relating to this "issue" are fully argued in appellees' Motion to Dismiss and Affirm at 17-22.

V

The Reviewing Court Did Not Preclude Further Consideration of the Substantive Merits of Public Convenience and Necessity

The specific allegation of error charged by the Government is that "the District Court erred in precluding further Commission consideration of the substantive merits of the public convenience and necessity issues," followed by the argument that this case "should" have been remanded for further Commission proceedings[76] (Brief 36-42). First, the District Court in no way precluded further Commission consideration. It entered a judgment that "suspended, annulled and set aside" those portions of the Commission's

76. Significantly, the Government now suggests only that if the reviewing court "believed evidence presented by appellees was entitled to greater weight, the case should have been remanded" (Brief 36). No contention is made that remand should follow where the agency's action was arbitrary or capricious or without rational basis.

order that authorized issuance of Certificates of Public Convenience and Necessity to appellants Bowman, Johnson and Red Ball (App. 739-740). The judgment did no more than enjoin the issuance of the specific certificates authorized in such order. The District Court, in declining to amend such judgment, stated:

> "The court's judgment simply enjoins issuance of the particular certificates authorized in the orders of the Commission held to be invalid . . . . The judgment does not usurp the administrative functions of the Commission. It simply recognizes and holds that the present record should no longer be utilized by the Commission in its determination of the basic issue of public convenience and necessity. The Commission remains perfectly free to make a new determination of this issue, based upon a new record developed in the light of current facts and conditions. The Commission may direct that this record be developed separately for each of the applicants, or jointly in regard to all of the applicants, as deemed desirable by the Commission. The court has left all of these matters to the Commission and in no way has the court encroached upon the Commission's prerogative to exercise its administrative functions." (364 F. Supp., at 1272; App. 822).

The Commission remains free to consider the substantive issues of public convenience and necessity at any time and, therefore, its delegated powers have been in no way usurped.[77]

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77. As the opinion below makes clear, the Commission was never without power to act not inconsistently with the court's jurisdiction. See *American Farm Lines* v. *Black Ball Freight Service*, 397 U.S. 532 (1970).

Secondly, the Government, for the first time, argues that this case "should" have been remanded. Following the District Court's entry of judgment on September 11, 1973, the Government filed its motion for amendment of that judgment "for the reason that such form of judgment is a matter beyond the jurisdiction of the Court in the circumstances presented" (App. 795). The Government's memorandum in support of its motion asserted that the injunction was "beyond the power of the Court" (App. 797); 28 U.S.C. § 2325 is to the contrary. Neither private appellants nor the Government took that position at any time prior to the motion, and the Government does not take that particular position here. The jurisdictional contention argued below has been abandoned, and a new remand question is now being raised. The Government should be foreclosed from raising the new issue here. The question that the proceeding *should* have been remanded is not properly before this Court inasmuch as it was not raised below. See *United States* v. *Arnold Schwinn & Co.*, 388 U.S. 365 (1967); *Neely* v. *Martin K. Eby Construction Co.*, 386 U.S. 317 (1967).

As to the Government's argument that this case *should* have been remanded, there is no question that it was within the power of the District Court to do so. *American Trucking Ass'ns, Inc.* v. *United States*, 364 U.S. 1 (1960). It is equally clear that remand may be neither necessary nor appropriate. *ICC* v. *Atlantic Coast Line R. Co.*, 383 U.S. 576 (1966). Because the statutes rarely address themselves to the issue of remand, the law in this area is mainly decisional.[78] Thus, the Government may cite cases including *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 17 (1952),

78. *E.g.*, the Natural Gas Act, 15 U.S.C. § 7171, specifically provides for remand procedures. The Interstate Commerce Act, 49 U.S.C. §§ 17(9), 305(g), 305(h), applicable here, makes no mention of remand.

where this Court recognized as a "guiding principle" that the function of the reviewing court ends when an error of law is laid bare. Similarly, appellees may cite *International Mine Workers* v. *Eagle-Picher Co.*, 325 U.S. 335 (1945), where this Court held that it could refuse an application for remand to the agency or, *Office of Communication of the United Church of Christ* v. *FCC*, 425 F.2d 543, 550 (CADC 1969), where the court held that it would serve "no useful purpose to ask the Commission to reconsider the Examiner's action and its own Decision and Order under a correct allocation of the burden of proof. The administrative conduct reflected in this record is beyond repair." Appropriateness of remand must be decided on a case-by-case basis. The guiding principle is: if remand would serve a useful purpose, then it is appropriate, *but not otherwise.*

No suggestion was made for remand at any time by any party until the Government's request following the judgment of the District Court. The private appellants have never applied for remand, and no one *ever suggested to the District Court that remand would serve a useful purpose.* The private parties developed the record before the Commission; and if remand would serve any useful purpose, it is certainly logical to look to such parties to contend and demonstrate that remand would be appropriate. However, only the Government suggests, for the first time, that any useful purpose would be served—a contention entirely at odds with the position of the private appellants.

The distinction between cases ordering remand and those finding remand inappropriate lies in each court's determination of the question of useful purpose. The District Court set forth at some length its reasons for its considered refusal to remand the case. First, the court rejected the Government's contention that it lacked jurisdiction to enter

the judgment wherein it made no provision for remand, citing 49 U.S.C. § 17(9); 49 U.S.C. §§ 305(g) and (h); 5 U.S.C. § 706; 28 U.S.C. § 1336a; 28 U.S.C. § 2325 (App. 811-812). That contention, which was the *only* remand issue below, was fully treated.[79] While the District Court recognized "that in a proper situation, a reviewing court should remand a proceeding to the Commission" (App. 814), it held that this case did not present such a situation. Recognizing that the applicants could at any time institute new or additional proceedings with the Commission, it was the court's opinion that the administrative conduct reflected in this record is beyond repair, and, therefore, "the present record should no longer be utilized by the Commission in its determination of the basic issue of public convenience and necessity" (App. 820, 822).

As the court correctly noted, it had before it a voluminous record dealing with the applications of 10 motor carriers. Its concern was with only three of those carriers, appellants here, and it noted that "there are tremendous portions of this record that are wholly unrelated to the applications of Red Ball, Bowman and Johnson. This is a unique situation resulting from the Commission's consolidation of ten major applications, and is a significant fact bearing upon the court's consideration of the Government's motion"[80] (App. 814). Noting this fact, the court found

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79. During the pendency of action before the District Court, no defendant challenged the jurisdiction or the authority of the court until the Government's final motion. Further, no defendant contended that the complaint requested relief beyond the jurisdiction of the court.

80. *E.g.*, counsel for Johnson, in response to questions from the court, placed emphasis on the fact that much evidence of record had no relationship to the Johnson, Bowman and Red Ball case (App. 536). Specifically, 506 of the 933 public witnesses were presented by applicants *other* than the three here involved. Some witnesses supported more than one applicant; *e.g.*, 746 supported the seven applicants *other* than Johnson, Bowman and Red Ball (App. 868).

it inappropriate to remand inasmuch as it "would impede rather than facilitate the Commission's consideration of any further proceeding involving the present and future public convenience and necessity" (App. 814). Further, the court properly found that a remand would put before the Commission a burdensome record containing voluminous extraneous matters, as well as five and six year old facts, which would not be helpful in making a further determination of such issue. For these reasons, and because changes in circumstances made it necessary for the Commission to give consideration to the current situation, the court properly recognized that use of the present record would "impede rather than facilitate" further consideration (App. 815-816). No one contended otherwise!

This situation, as noted by the court, is analogous to that in *Campbell Sixty-Six Express, Inc.* v. *United States,* 258 F. Supp. 529 (W.D. Mo. 1966). There, the court found the Commission's action arbitrary and capricious and set the order aside. There was no remand and there was no appeal. The applicant in that proceeding subsequently filed a new application and a certificate was granted (App. 818). Applicants here have been free at any time to follow the same course. This illustrates that remand is not always necessary nor is it always appropriate.

That remand is not appropriate in all cases is amply demonstrated, not only by the cases set forth above, but also by *Zuber* v. *Allen,* 396 U.S. 168 (1966); *Shannon* v. *United States,* 219 F. Supp. 781 (W.D. Tex. 1963), *aff'd* 377 U.S. 311 (1964); *Pacific Coast Wholesalers Ass'n* v. *United States,* 81 F. Supp. 991 (S.D. Cal. 1949), *aff'd* 338 U.S. 689 (1950); *Garrett Freightlines, Inc.* v. *United States,* 324 F. Supp. 575 (Idaho 1971); *Ashworth Transfer, Inc.* v. *United*

States, 315 F. Supp. 199 (Utah 1970); *Pennsylvania R.R.* v. *United States*, 202 F. Supp. 584 (E.D. Pa. 1962).[81]

The Government's attempt to distinguish *Atlantic Coast Line* and *Zuber* fails. It must be remembered that, in the instant case, the request for remand was made only after judgment and then only on jurisdictional grounds. The question raised before this Court was not present in the District Court, and, for that reason alone, is not properly in issue here. In any event, those two cases recognize that in some instances a remand is required but that in other instances the court can dispose of the matter without any necessity for remand.

In view of the "unique situation" involved (App. 814), the case at bar is strikingly similar to *Office of Communication of the United Church of Christ* v. *FCC*, 425 F.2d 543, 550 (CADC 1969), where it was stated by Judge, now Chief Justice, Burger:

> "The record now before use leaves us with a profound concern over the entire handling of this case following the remand to the Commission. The impatience with the Public Intervenors, the hostility toward their efforts to satisfy a surprisingly strict standard of proof, plain errors in rulings and findings lead us, albeit reluctantly, to the conclusion that *it will serve no useful purpose to ask the Commission to reconsider the Examiner's actions and its own Decision*

81. Permanent injunctions were entered against Commission orders, without remand, in *Pacific Coast*, *Shannon*, *Garrett*, *Ashworth*, and *Pennsylvania R.R.* No appeal was taken in the latter three cases, and *Pacific Coast* and *Shannon* were affirmed on appeal. In *Zuber*, involving an order entered by the Secretary of Agriculture, the Court of Appeals (402 F.2d 660) found no reason to remand, and this Court found remand inappropriate, 396 U.S., at 196.

and Order under a correct allocation of the burden of proof. The administrative conduct reflected in this record is beyond repair." (emphasis added).

FCC v. *Pottsville*, 309 U.S. 134 (1940), and *FPC* v. *Idaho Power Co.*, 344 U.S. 17 (1952), relied upon by the Government, merely state the "guiding principle" of remand.[82] They do not strip a reviewing court of its discretion. It is the exclusive function of a reviewing court to determine whether remand will serve a useful purpose. The Government fails to explain what useful purpose will be served, nor did it even attempt to do so in the District Court. The private appellants, on the other hand, admit by their silence that no such purpose will be served, thus agreeing with the District Court.

The District Court has considered the issue of whether a useful purpose will be served by remand. And the District Court, in its considered judgment, determined that remand would "impede rather than facilitate" further consideration of the issues. The decision was a proper exercise of the court's discretion and should not be disturbed.

As in *Office of Communications of the United Church of Christ*, the record in the instant case is beyond repair. It contains "tremendous portions" of irrelevant and im-

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82. *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156 (1962), cited by the Government for procedure to be followed when changes occur, involved a change in statutory law subsequent to the Commission decision, having a direct effect on the decision.

material facts and improper issues[83] which would indeed "impede rather than facilitate the Commission's consideration of any further proceedings involving the present and future public convenience and necessity" (App. 814). For these reasons, and because it was an appropriate exercise of the court's discretion, the District Court properly declined to amend its judgment.

VI

The Court's "Usual Rule of Noninterference" Is Applicable

Unquestionably, the reviewing court made a comprehensive, in-depth review and a fair assessment of the record as a whole. Accordingly, this Court's "usual rule of noninterference" is applicable.

While disposing of this case, the District Court was acting as a statutory "reviewing court" pursuant to § 706 and 28 U.S.C. §§ 2321-2325. *Universal Camera Corp.*, 340 U.S., at 491, holds that "[w]hether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of" such reviewing courts. This Court's "power to review the correctness of application of the . . . standard ought seldom to be called into action." *Ibid.* Specifically, "[t]his Court will intervene only in what ought to be the rare in-

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83. New and improper issues, "not presented to the Examiners," were injected by the intervening shippers. "The shippers' contentions were more political than judicial. They urged liberalization of the traditional regulatory requisites for certifications, stating that a change in Commission policy was favored by the Administration" (App. 1302). Private appellants suggest that such issues were not, in fact, injected because they were contained in a pleading "never accepted for the record" (Brief 43; Lorch J.S. 13-14). They do not mention their other pleadings and briefs, repeating the same contentions, that *were received*. See, *e.g.*, Lorch's Reply to Petitions for Reconsideration, at 5 and Petition to Supplement Exceptions, at 3.

stance when the standard appears to have been misapprehended or grossly misapplied." *Ibid.*

In *NLRB* v. *Pittsburgh S.S. Co.*, 340 U.S. 498, 503 (1951), decided the same day as *Universal Camera Corp.*, this Court said:

> "This is not the place to review a conflict of evidence nor to reverse a . . . [reviewing court] because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way. It is not for us to invite review by this Court of decisions turning solely on evaluation of testimony where on a conscientious consideration of the entire record a . . . [reviewing court] under the new dispensation finds the . . . [agency's] order unsubstantiated. In such situations we should 'adhere to the usual rule of noninterference where conclusions of . . . [reviewing courts] depend on appreciation of circumstances which admit of different interpretations.' Federal Trade Com. v. American Tobacco Co., 274 U.S. 543, 544."

Universal Camera Corp. and *Pittsburgh S.S. Co.* involved questions of substantiality of evidence *vel non*. But clearly those factors underlying the "usual rule of noninterference" make it equally applicable to decisions involving the arbitrary or capricious standard. The substantial evidence standard and the arbitrary or capricious standard are both questions of law.[84] And just as the re-

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84. Section 706 recites that, *inter alia*, "the reviewing court shall decide all relevant questions of law" and then enumerates the "questions," including the substantial evidence standard and the arbitrary or capricious standard. In addition, the Senate and House Reports accompanying the APA state that § 706 "provides that questions of law are for courts rather than agencies to decide in the last analysis and it also lists the several categories of questions of law." S. Doc. No. 248, 79th Cong., 2d Sess. 214, 278 (1946).

viewing court must consider the record as a whole to apply the substantial evidence standard, so must it do so to determine whether the agency violated the arbitrary or capricious standard. The application of both standards calls for the considered judgment of the reviewing court based upon its "evaluation" of the whole record, and its "appreciation of circumstances which admit of different interpretations." Neither standard is cut and dried; neither, a mere litmus test. Just as determination of substantial evidence, *vel non*, "has [been] placed in the keeping of" the reviewing court, so also has the arbitrary or capricious standard.

Except in " 'rare instance[s] when the standard [of review] appears to have been misapprehended or grossly misapplied'," this Court need only find that the reviewing court "made a 'fair assessment' of the record." *FTC* v. *Standard Oil Co.*, 355 U.S. 396, 400 (1958). Accord, *e.g.*, *Golden State Bottling Co., Inc.* v. *NLRB*, 414 U.S. 168, 174 (1973); *Communist Party* v. *Subversive Act. Cont. Bd.*, 367 U.S. 1, 69 (1961); *Peurifoy* v. *Commissioner of Internal Revenue*, 358 U.S. 59, 61 (1958); and *NLRB* v. *American Nat'l Ins. Co.*, 343 U.S. 395, 410 (1952).

After an in-depth and "fair" review of the record as a whole, based upon an evaluation of that record, the District Court found the agency action arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law. This Court should therefore adhere to its usual rule of noninterference, even though this Court, if making an independent review, might "find the record tilting one way rather than the other."

CONCLUSION

The judgment of the District Court should be affirmed.

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APPENDIX I

Specific Exceptions Filed by Private Appellants to the Examiners' Report

APPENDIX I

The private appellants filed exceptions to the examiners' report pursuant to the requirements of Rule 96 of the Commission's Rules of Practice.[1] The exceptions filed by each such appellant are as follows:

Johnson:[2]

The Examiners erred in:

(1) generally merging throughout their recommended report their consideration, findings, and conclusions respecting the evidence relating to the Johnson application and other applications consolidated herein and in thereby failing to evaluate and make adequate findings and conclusions relating to the Johnson application as a separate and independent matter;

(2) finding, on the basis of their erroneous treatment of the applications as a group, that there is no public need for the service proposed by the Johnson application because existing service is adequate; and

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1. Rule 96-Exceptions to officer's report.

"(a) *Generally.* Exceptions to the officer's report with respect to statements of fact or matters of law must be specific and must be stated and numbered separately. If exception is taken to conclusions in the report, the points relied upon to support the exception must be stated and numbered separately. When exception is taken to a statement of fact contained in the report, reference also must be made to the page or part of the record relied upon to support the exception and a corrected statement must be incorporated." 49 C.F.R. 1100.96(a).

2. Johnson Exceptions, March 24, 1970, at 4.

(3) concluding on the basis of their erroneous treatment of the applications as a group, that the benefits of the service proposed by the Johnson application would be "far outweighed by the serious adverse effect" that grant of the Johnson application may have upon existing carrier services.

Bowman:[3]

The Examiners erred:

(1) In considering all 10 applications collectively, and neglecting and failing to relate the testimony to the Bowman proposal or to give effect to the multiple complaints directed toward existing carriers.

(2) In arriving at ultimate conclusions and basing the Recommended Report on broad generalities without specific findings as to the basic facts of record.

(3) In considering and treating the testimony only in relation to commodities shipped to the substantial exclusion of territories and points involved.

(4) In failing to consider the divisible aspects of the Bowman application.

(5) In failing to recommend approval of the Bowman proposal to serve 10 named Mississippi points.

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3. Bowman Exceptions, March 10, 1970, at 12, 13.

(6) In failing to recommend that the service proposed by Bowman to Kansas City, Kansas-Missouri, Springfield and Carthage, Missouri, and Topeka, Kansas, be approved.

(7) In failing to recommend approval of all aspects of the Bowman application.

Red Ball:[4]

The Examiners erred:

(1) In concluding that the 933 public witnesses failed to establish a need for an additional carrier service.

(2) In concluding that a grant of the Red Ball application will have an adverse affect on existing carrier services.

(3) In treating these applications as "all or nothing at all".

Intervening Shippers:[5]

The Examiners erred:

(1) In recommending an economic love feast ("a more cooperative effort and better communication," "exercise of more diligence and care," and "an understanding of the practical problems involved") between carriers and shippers as a substitute for competition.

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4. Red Ball Exceptions, March 10, 1974, at 7, 13, 16.

5. Lorch Exceptions, filed March 23, 1974, accepted, *nunc pro tunc*, March 30, 1970, at 22, 23.

(2) In concluding that the Commission must grant existing carriers an opportunity to remedy deficiencies in service before authorizing proposed service by another carrier.

(3) In determining public convenience and necessity by placing considerations of possible detriment to existing carriers through increased competition ahead of benefit to the public, including intervening shippers.

(4) In concluding that "[t]he primary issue is not so much the availability of service, but whether the quality of the existing authorized services is adequate to meet the needs and requirements of the public."

(5) By sidestepping the consideration of "monopolistic tendencies in evaluating the existing motor carrier services in order to encourage competition, innovation, and improvement of service to the public. . ."

APPENDIX II

Examples of Findings and Conclusions by the District Court That the Division's Treatment of the Evidence Was Arbitrary and Capricious, an Abuse of Discretion, and Without Rational Basis

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Note: This appendix sets forth direct quotations from the District Court's opinion as published in 364 F. Supp. 1239. The copy of the opinion included in the printed Appendix prepared by appellants contains numerous typographical errors, some, but not all, of which are listed on the "Errata Sheet" to the Appendix.

APPENDIX II

The opinion of the District Court (364 F.Supp. 1239; App. 1275) has been analyzed for the purpose of setting forth examples of its findings and conclusions that the Division's treatment of the evidence was arbitrary and capricious, an abuse of discretion, and without rational basis. In each instance, the finding is first set forth followed by the related conclusion.

Findings A

The pivotal point of the Division's grant to Red Ball, Bowman and Johnson involved the treatment of evidence relating to the quality of existing service. As noted, applicants contended that the quality of existing service, primarily from a transit-time standpoint, failed to meet the needs of shippers. In resolving this issue adverse to applicants, the Examiners gave consideration both to the evidence as to transit time presented by the shippers and to the voluminous evidence on the same subject presented by protestants. Although the Division expressly adopted the Examiners' findings relative to protestants' proof, they reached the conclusion that the transit-time studies presented by the protestants "do not present as valid a picture as those introduced by those witnesses supporting the applications." This conclusion was predicated upon two factual findings as to protestants' studies: "(1) that most either relate to short periods of time or cover traffic handled for specific shippers and (2) that they were made when protestants were confronted with the possibility of grants of authority to additional carriers." 114 M.C.C. at 599 (364 F.Supp. at 1250; App. 1293).

Conclusions A

12. There is no rational basis for the Division's refusal to give weight to the extensive transit-time studies presented by protestants. These studies constituted the most important part of protestants' evidence and collectively reflected their service on more than 120,000 shipments. No contention was made at the hearing or on brief that they did not portray normal or representative service of the involved carriers. The length of time covered by the studies or the dates embraced therein were not considered significant by the parties or the Examiners. Indeed, these facts were not deemed sufficiently important by the Division itself to be mentioned in its own findings relative to evidence presented by certain protestants. For example, as to plaintiff Campbell, the Division's finding makes no mention of the length of time or the dates involved in its studies. 114 M.C.C. at 777. Other findings were stated in the same manner; that is, the results were set forth without regard to the length or the date of the studies, thereby showing that the Division deemed such facts unimportant. The conclusion that these studies are entitled to little weight because they "relate to short periods of time" is completely arbitrary. Many covered longer periods of time than those presented by applicants and others covered periods identical to the applicants'. The Division's reliance upon the applicants' studies and its refusal to rely upon protestants' studies constitutes arbitrary and capricious actions (364 F.Supp. at 1259; App. 1310).

Findings B

Plaintiffs contend that this treatment of vital evidence presented in support of their protests was arbitrary, capricious, and an abuse of discretion and, therefore, violative

of the provisions of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). This contention is based upon a comparison of the Division's treatment of protestants' evidence with other findings in its report:

1. The Division gave credence to and predicated ultimate conclusions upon the same type of studies presented by applicants that (a) covered periods of time as short as or shorter than those presented by protestants and (b) covered periods of time in which the applications were pending, such periods being, in some instances, more recent than those utilized by protestants. See e. g., 114 M.C.C. 586.

2. The periods of time covered by protestants' studies conformed generally to the periods covered by the shippers' studies.

3. The shippers' studies generally "comprise only a *few* shipments made over a very extensive period of time," whereas all protestants' studies included *all* shipments handled during the periods covered.

4. Whereas shippers, or applicants acting for shippers, picked shipping documents "selected specifically to show poor service" or included only "records of shipments upon which there had been some difficulty," the protestants' studies included all shipments, good and bad. (See Examiners' Report, p. 10). (364 F.Supp. at 1251; App. 1293).

The protestants' transit-time studies, discredited by the Division, were given considerable weight by the Examiners. The Division acted on its own motion in finding that they were entitled to little weight because "they relate to short periods of time," or because they "cover traffic handled for specific shippers," and because "they were made when protestants were confronted with the possi-

bility of grants of authority to additional carriers." The record disclosed that all such exhibits were presented as representative of normal service rendered by the involved carriers. No one challenged this fact at the hearing or on exceptions. In finding that they were entitled to little weight for the reasons assigned, the Division acted *ex mero motu,* thereby depriving protestants of any opportunity to defend their propriety or correct the alleged deficiencies. The condemnation of such studies on the ground that some "cover traffic handled for specific shippers" is particularly unwarranted. Again, this "deficiency" was not suggested by any party; therefore, the sponsors of the exhibit were given no opportunity to explain the inappropriateness of the criticism. Explanations contained in petitions for reconsideration were apparently ignored by a majority of the Division. Regardless of such explanations, however, even a casual examination of the record would have disclosed that all protestant exhibits covering "traffic handled for specific shippers" related to shippers that had testified in support of the applications. They consisted of obviously relevant evidence offered to rebut the shippers' evidence. In like manner, no suggestion had been made by any party that protestants' exhibits did not reflect normal or representative service because they covered "periods subsequent to the notice of the commencement of the hearings in these proceedings." Clearly, applicants could not have challenged them on this ground, since all of applicants' exhibits, accepted and credited by the Division, were subject to the identical "deficiency." Overlooked by the Division were the exhibits presented by one protestant covering periods prior to such notice, as well as subsequent thereto. (Exhibits 1747-1763). General service exhibits were presented by fourteen different protestants (including Red Ball) and collectively reflected service of more than 120,000 shipments. (364 F.Supp. at 1251; App. 1295).

Conclusions B

13. The Division's condemnation of protestants' studies on the ground that some "cover traffic handled for specified shippers" is particularly unwarranted. The applicants placed in issue the quality of service rendered by specific carriers to specific shippers by presenting such shippers as witnesses. Protestants then presented shipping documents taken from their files evidencing specific service rendered for those same shippers. Clearly, there is no rational basis for the Division's consideration of such evidence presented by applicants and its refusal to consider such evidence presented by protestants.

14. The rejection of protestants' traffic studies on the ground that they cover periods of time subsequent to the filing of the applications is also without rational basis. The Division made specific findings in favor of applicants based upon applicants' studies that covered similar or later periods of time. Again, one standard was applied to applicants and a different standard to protestants. The "law does not permit an agency to grant to one person the right to do that which it denies to another similarly situated. There may not be a rule for Monday, another for Tuesday, a rule for general application, but denied outright in a specific case." Mary Carter Paint Co. v. F. T. C., (5 Cir. 1964) 333 F.2d 654, 660 (concurring opinion), rev'd on other grounds 382 U.S. 46, 86 S.Ct. 219, 15 L.Ed.2d 128. HC&D Moving & Storage Company v. United States, (Hawaii 1969) 298 F.Supp. 746.

15. The "deficiencies" that, in the view of the Division, destroyed the effectiveness of protestants' studies were "deficiencies" that had not been suggested by anyone prior to the Division's ruling. Protestants, therefore, were given no opportunity to defend the propriety of such evidence or correct such "deficiencies." Applicants and prot-

estants alike had followed identical established standards in presenting their traffic studies, and if such standards are to be changed, the parties were entitled to reasonable notice and an opportunity to conform to such change. The Commission's failure to do this under similar circumstances required the court, on two occasions, to set aside their orders in Ringsby Truck Lines, Inc. v. United States, (D.C.Colo. 1967) 263 F.Supp. 552, appeal dismissed as moot, 389 U.S. 576, 88 S.Ct. 689, 19 L.Ed.2d 775 (1968); Ringsby Truck Lines, Inc. v. United States, (D.C.Colo. 1972) 1972 Fed.Carr.Cas. ¶ 82,305, case dismissed, U.S.Sup.Ct. Oct. 24, 1972. In its first decision the court stated:

> "Certainly when carriers appear before the commission, they are entitled to know by what standards they are going to be judged * * * and indeed the Commission itself has said that 'in fairness, standards should not be changed without due notice.' General Increases—Transcontinental, 319 I.C.C. 792, 803 (1963). See also, E. Brooke Matlack, Inc., v. United States, 119 F.Supp. 617 (E.D.Pa. 1954)."

In *Ringsby,* as in the case at bar, the Division rejected traffic studies as not being representative although "there was absolutely no counteravailing evidence" as to their representativeness. This court agrees with the court in *Ringsby* that there was no rational basis for such action.

. . .

25. Certain defendants seek to support the Division's rejection of protestants' service exhibits as being consistent with prior Commission decisions. They cite Braswell Motor Freight Lines, Inc., Extension—Atlanta, (1966) 100 M.C.C. 482, but in that case the Commission found that:

> "* * * most of the service deficiencies relating to transit times about which the supporting shippers

and receivers complain and which are reflected in their service exhibits *are not directly disputed or explained in the service exhibits sponsored by any protestant, or otherwise.*" 100 M.C.C. at 493.

Thus, in *Braswell,* the Commission criticized protestants for *failing* to present service exhibits that directly disputed the shippers' exhibits. In the case at bar, however, the Division criticized the protestants because they *did* present such evidence.

Taking note of the Division's rejection of protestants' studies because they related to service rendered after the applications were filed, defendants cite T.S.C. Motor Freight Lines, Inc. v. United States, (Tex.1960) 186 F. Supp. 777, aff'd sub nom. Herrin Transportation Co. v. United States, 366 U.S. 419, 81 S.Ct. 1356, 6 L.Ed.2d 387. Protestants' traffic studies were discredited by the Commission in that proceeding because there was 'evidence showing a noticeable increase in satisfactory service shortly prior to the hearings on these applications.' There was no such evidence in the present case, however. In fact, applicants here alleged that there was a deterioration of service during the period subsequent to the filing of the applications. (364 F.Supp. at 1260, 1263; App. 1311, 1317).

Findings C

Plaintiffs further contend that the Division arbitrarily considered only those portions of the shippers' transit-time studies that were favorable to applicants while refusing to consider those portions unfavorable to applicants. This contention is supported by the Division's failure to consider the summaries of the shippers' exhibits prepared by protestants. These summaries of the shippers' evidence demonstrated that service rendered by the applicants was not superior, but in fact was inferior, to that rendered

by protestants, and that protestants' service was, on the whole, reasonably expeditious. (364 F.Supp. at 1251; App. 1294).

Conclusions C

17. Other evidence received similar arbitrary treatment by the Division. It predicated essential findings upon portions of traffic studies, presented by applicants' shippers, favorable to applicants, but refused to consider comprehensive summaries of the identical studies compiled by protestants and relied upon by protestants to demonstrate that applicants' own exhibits, viewed in their entirety, showed performance by protestants superior to that of applicants as well as reasonably adequate protestant service. . . . .

18. Other evidence presented by applicants' shippers received similar treatment by the Division. Findings of the Examiners, and findings embodied in an appendix to the Division's report, reflecting unfavorably upon applicants received emphasis by the Examiners but no consideration by the Division. (364 F.Supp. at 1261; App. 1313).

Findings D

Bowman and Johnson both presented transit-time studies for the declared purpose of demonstrating their ability to perform in accordance with their proposals. Red Ball, as a protestant, presented limited studies of this type. At one point in its report, the Division accepted applicants' evidence as substantiating applicants' ability to perform as proposed. However, in disposing of protestants' contentions that, when viewed in their entirety, applicants' evidence demonstrated performance inferior to that proposed, the Division ruled that such evidence could not be con-

sidered for the purpose of testing applicants' ability to perform as proposed. Accordingly, the identical evidence offered by applicants was accepted and credited, to the extent favorable to applicants, but rejected as having no probative value when stressed by protestants. Compare 114 M.C.C. at 586 and 611. Bowman, on brief, continues to urge the appropriateness of such evidence as providing the "best comparison" of its present with its proposed service (Bowman brief, p. 65), thereby acknowledging the Division's error in ruling that, to the extent such evidence was unfavorable to applicants, it had no probative value.

. . .

The significance of the Division's refusal to consider portions of applicants' evidence reflecting unfavorably on applicants and their stated refusal to afford weight to protestants' service exhibits is demonstrated by brief comparisons of applicants' service with protestants' service, as reflected by the exhibits. Before the Commission and before this Court, Bowman recommends its service exhibits as offering "the best comparison for the service actually being performed over present and proposed routes." Protestants pointed out to the Division, however, that such exhibits actually establish performance greatly inferior to that proposed. In many instances, Bowman demonstrated that it delivered its traffic on time only 55% of the time. Johnson's on-time performance ranged from 22.5% to 58.5%. These facts were ignored by the Division. They did find, however, the protestants' evidence reflected greatly superior service. For example, as to plaintiff Gordons, the Division found that its record of 5,694 shipments "disclosed 'on-time' performance on 81 percent of the shipments, and that 96 percent were delivered by the first day beyond the established standard." 114 M.C.C. at 768. On 7,885 shipments transported by plaintiff Mercury, its on-time performance "ranges from

a low of 76.4 percent to a high of 93.8 percent." 114 M.C.C. at 771. Plaintiff Campbells' on-time performance ranged "from 71.6 percent to 82.4 percent." 114 M.C.C. at 777. Plaintiff Roadway's performance on more than 16,000 shipments "indicates a very substantial on time performance." 114 M.C.C. at 783. Another protestant, on more than 7,000 shipments, established "on time service performance ranging from a low of 80.5 percent to a high of 90.9 percent and an overall average of 86.4 percent." 114 M.C.C. at 790. Various other findings also appear in Appendix G; however, in the body of the Division report, none of these findings are mentioned. (364 F.Supp. at 1251, 1252; App. 1295, 1296).

Conclusions D

16. While predicating findings, favorable to applicants, upon applicants' traffic studies, the Division refused to consider those portions of the *same exhibits* reflecting unfavorably upon applicants. For example, Bowman's studies are cited to support the conclusion that Bowman *can* perform the type and quality of service proposed (p. 586) but the *identical exhibits* were found to have *no probative value* when cited by protestants to support their challenge that Bowman *cannot* perform as proposed (p. 611). Since such studies were presented by applicants for the stated purpose of establishing "the feasibility of the proposals," and since applicants still commend them on brief as being the best evidence of applicants' capabilities, the Division's refusal to consider those portions unfavorable to applicants clearly lacks a rational basis.

. . .

In making its decision "the court shall review the whole record or those parts of it cited by a party * * *." 5 U.S.C. § 706. Although some question concerning the court's duty to review the whole record existed prior to

enactment of the Administrative Procedure Act, Professors Jaffe and Davis, the two leading authors on administrative law, both emphasize that this question was laid to rest with the decision in Universal Camera Corp. v. N. L. R. B., *supra*. Professor Davis cites the statement by Justice Frankfurter in Universal Camera Corp., at 340 U.S., at 488, 71 S.Ct., at 464, that: "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight." K. Davis, Administrative Law Treatise, Vol. 4, § 29.03, at 129-30 (1958). Professor Jaffe explains the requirement for review on the whole record, as follows:

> "* * * This must mean evidence in the case and in the context of the case. To abstract out of a case that part of the evidence which can be made to support a conclusion is to imagine an abstract case, a case that was never tried. *A conclusion based on such abstracted evidence may be 'rational,' but it is not a rational decision of the case which was in fact tried.* Evidence which may be logically substantial in isolation may lose its logical relevance, even its claim to credibility, in context with other evidence. The rationality or substantiality of a conclusion can only be evaluated in the light of so much of the situation as is made to appear * * *." Judicial Control of Administrative Act, at 601.

10. Our review of the Division's report in the light of the whole record compels us to the conclusion that the Division based its ultimate conclusions upon subordinate findings that can be supported only by a consideration of portions rather than the entire record. Such action was, therefore, in the legal sense, "arbitrary and capricious." Campbell Sixty-Six Express, Inc. v. United States, (W.D. Mo. 1966) 258 F.Supp. 529. (364 F.Supp. 1260, 1259; App. 1312; 1309).

Findings E

Again acting on its own motion, the Division took official notice of an industry publication which revealed that one protestant discontinued its terminal at one of the involved points subsequent to the hearing. 114 M.C.C. at 605. At the same time, the Division relied strongly upon its finding that Red Ball maintained 92 terminals, "about three times the collective number of terminals operated by" the three other Southwestern carriers. 114 M.C.C. at 602. In view of such findings, protestants urged the Division to notice that the same industry publication cited by the Division revealed the fact that Red Ball had discontinued 35 of the terminals mentioned by the Division. The Division declined to acknowledge this admitted fact. Also ignored was the evidence of record disclosing Bowman's failure to maintain terminals at numerous major cities along its routes, many of which are far larger than the one at which the protestant's terminal was discontinued. (364 F.Supp. at 1253; App. 1298).

Conclusions E

20. On its own motion, the Division took official notice of an industry publication which revealed that one terminal described in a protestant's evidence had been closed subsequent to the hearing. At the same time, the Division placed emphasis upon the large number of terminals maintained by applicant Red Ball. Since the same industry publication cited by the Division also revealed that many of Red Ball's terminals had been closed subsequent to the hearing, the Division should have noted that its findings as to Red Ball were substantially incorrect. Most certainly the Division should not have relied upon information in the publication favorable to an applicant while refusing to consider those portions of the

same publication reflecting unfavorably upon an applicant. In like manner, if the Division considered it significant that a protestant failed to maintain a terminal at one of the involved points, why was no mention made of Bowman's failure to maintain terminals at numerous, larger cities? The basic rudiments of fairness were simply not applied. (364 F.Supp. at 1261; App. 1314).

Findings F

After enumerating various complaints voiced by the shippers, the Examiners found that: "The entire scope of the complaints fall upon both applicants and protestants, as well as upon other carrier services which the witnesses use." (Examiners' report, p. 8). The complaints embraced interline or service restrictions promulgated by Red Ball, Bowman, and Johnson as well as by certain protestants. The Division discussed the complaints as they related to protestants' service, but ignored the admitted fact that they applied equally to applicants' service. For example, the Division specifically condemned certain protestants for promulgating tariff or service restrictions while refusing to mention identical restrictions promulgated by Red Ball, Bowman and Johnson. 114 M.C.C. at 596-8. Evidence of applicants' restrictions appear in the record. In addition, protestants unsuccessfully urged the Division to take note of additional restrictions of this type filed with the Commission by such applicants subsequent to the hearing. In their briefs, applicants, following the Division's pattern, emphasize evidence of deficiencies relating to protestants but ignore identical evidence relating to applicants. (364 F.Supp. at 1253; App. 1297).

Conclusions F

. . . The Division also refused to consider interline and service restrictions imposed by Red Ball, Bowman

and Johnson, as shown in the record, while predicating conclusions based upon identical restrictions and practices on the part of certain protestants. [Also ignored were additional service restrictions filed with the Commission by such applicants subsequent to the hearing.] Again, the identical type of evidence was relied upon by the Division when favorable to applicants and ignored when adverse to applicants. The Examiners, however, cited and relied upon all such evidence. (364 F.Supp. at 1261; App. 1313).

Findings G

At several places in its summary of protestants' evidence, the Division refers to extensions or expansions of certain protestants' operating authority, resulting largely from mergers or acquisitions consummated subsequent to the close of the hearing. At no point in its report, however, does the Division evaluate the effect of this expanded service. More significant is the Division's failure to make any comprehensive evaluation of the scope or extent of all carrier service available at the time of its decision. This is particularly significant because its decision was rendered more than four years after the close of the hearing. Instead of considering the quantum of service available at the time of its decision, the Division referred, instead, to a study presented by Johnson at the opening of the hearing, and concluded that such study disclosed "that comparatively there is a paucity of single-line motor carrier service available." 114 M.C.C. at 592. The study referred to was then more than five and one-half years old. It showed, for example, that only three single-line carriers operated between Atlanta and Dallas, the focal points of the applications. Actually, however, there were thirteen such carriers operating between these points at the time of the Division's decision. The exhibit relied upon by

the Division for its finding concerning the "paucity of single-line motor carrier service available" reflected three carriers authorized to operate between Atlanta and Houston, one between Atlanta and Baton Rouge, and three between Atlanta and Jackson. At the time of its decision, however, eleven were in operation to Houston, seven to Baton Rouge, and eight to Jackson. Similar changes took place between more distant cities. Between Baltimore and Houston, there was an increase from one to seven; between Boston and Dallas the increase was from three to nine; between Charlotte and Dallas, from one to five; between New York and Jackson, from zero to three; between Philadelphia and Houston, from two to six; and between Richmond and Baton Rouge, from zero to three. (See Summary reproduced in plaintiffs' initial brief, pp. 142-5). The Division ignored protestants' pleas that consideration be given to this increased service. (364 F.Supp. at 1253; App. 1298).

Conclusions G

21. The court cannot discern any rational basis for the Division's conclusion that three additional carriers are needed to meet the needs of the shipping public. The report contains no comparative analysis of the quantity of service available between any of the involved points; therefore, there is simply no way to determine whether the available service between any such points is or is not sufficient. Although references were made in an appendix to the grant of certain additional authority to some protestants subsequent to the hearing, neither the extent nor the effect of such authority is mentioned in the Division's evaluation of the evidence. Instead, the Division refers to an exhibit, then more than five and one-half years old, as showing "that comparatively there is a paucity of single-line motor carrier service available." The state-

ment that new grants of authority to protestants and others have "been accorded full and careful consideration" (p. 576) cannot be accepted as a substitute for adequate findings, and the report is devoid of any findings or any discussion of the total services available at the time of the hearing and at the time of the decision.

The issue before the Commission involved the "present or future public convenience and necessity." 49 U.S.C. § 307(a). At the close of 1971, when its decision was made, the Division discussed only the quantity of service available in early 1966. At the same time, however, it acknowledged its duty to consider the recent grants of authority by citing West Brothers, Inc., Extension—Baton Rouge, La., (1969) 108 M.C.C. 485, 489, and Ayers, Extension—Cheyenne, Wyo., (1965) 99 M.C.C. 795, 797. *West* is uniquely applicable. There, the Commission declined to grant authority to West (a plaintiff herein) between Birmingham and Baton Rouge (points here involved) solely on the ground that one carrier, Mercury (another plaintiff herein), had been granted authority to operate between such points subsequent to the hearing of West's application, stating:

> "In order to carry out the dictates of the national transportation policy, we may take official notice of our actions in other proceedings which bear materially upon the issues under immediate consideration. In so doing we must give effect to the actions taken in other proceedings. [citing cases]. While Mercury is not a party to this proceeding, we may take official notice of its recently granted certificate." 108 M.C.C. at 489.

To illustrate: Nowhere in the report now under review does the Commission consider, or even disclose, that the exhibit showing a "paucity of single-line service" reflected only one direct carrier between Atlanta and Baton Rouge in 1966, whereas seven such carriers were in operation at the time of the Division's decision. *West* was decided while the present case was pending on exceptions. If the addition of one carrier (Mercury) between Birmingham and Baton Rouge was sufficient to cause denial of West's application, why, indeed, did not the addition of six new carriers require denial of the present applications between Atlanta and Baton Rouge? The Commission's report does not supply a rational answer to this question. Instead, it contains a grant of three more carriers between Atlanta and Baton Rouge, bringing the present total to ten. It also grants two more (Red Ball and Bowman) between Birmingham and Baton Rouge, a decision which appears to be in direct conflict with its prior decision in West. (364 F.Supp. at 1261; App. 1314).

APPENDIX III

Examples of Findings of Fact in an Appendix to the Division's Report Showing Adverse Effect on the Public Interest

APPENDIX III

Some specific examples of serious adverse effect on existing carriers which the examiners found would result from the grant of any authority and which would be adverse to the public interest, as set forth in Appendix D to their report (App. 1193). The Division adopted such findings verbatim in Appendix G to its report (App. 319):

Plaintiff Holloway: ". . . They are completely satisfied with the service Holloway affords . . . All of the westbound and a large portion of the eastbound traffic of Holloway would be subject to diversion with the grant of the Bowman application." (App. 320-321).

Plaintiff Alamo: ". . . diversion of this valuable freight may adversely affect its ability to render a satisfactory service in this area." (App. 323).

Protestant Missouri Pacific and other rail interests: ". . . These protestants are not operating to capacity and diversion of any of their traffic will adversely affect them." (App. 328).

Plaintiff Gordons: ". . . The traffic Gordons handles is especially susceptible to diversion by the new service proposals of these proceedings. . . . Overall, 54 percent of all shipments handled by Gordons on its entire system are subject to diversion through these proceedings representing 54.6 percent of its tonnage and 58.5 percent of its total 1966 operating revenue. . . . Diversion of their freight to other carriers will seriously affect Gordons' ability to render adequate and satisfactory service, and will result in increasing its operation of empty vehicle miles between certain of its terminals. In 1966 Gordons operated empty vehicles

a total of 1,045,560 miles, much of it between points involved in these applications." (App. 330).

Plaintiff Mercury Motors: ". . . This freight (1,079,150 pounds, producing revenue of $8,764) is subject to diversion to Bowman should the Bowman application be granted." (App. 332).

Plaintiff West Brothers (now Roadway of Miss.): ". . . Any diversion of freight from its primary terminal points leaving operations only at the numerous smaller communities will be destructive of West's business and operations." (App. 335).

Applicant-protestant Deaton: ". . . Diversion of any northbound freight creating further imbalance of operation will be extremely harmful to Deaton's operations." (App. 335).

Applicant-protestant Floyd & Beasley: ". . . Any diversion of its present traffic will seriously affect its financial stability." (App. 336).

Protestant Pilot Freight: ". . . A diversion of freight will be detrimental to Pilot's operations." (App. 338).

Protestant Mason and Dixon: ". . . A grant of the Bowman application will subject a very substantial portion of this traffic (6.5 million lbs.) to diversion." (App. 338).

Plaintiff Campbell: ". . . Diversion of freight from its terminal points will result in a deterioration of service at many of the smaller points served by Campbell Sixty-Six, particularly in Mississippi, which are not proposed to be served directly by these applicants." (App. 339).

Protestant East Texas: ". . . Any diversion of its present freight which may result from the grant of

these applications will impair its ability to continue its present standard of service." (App. 342).

Plaintiff Transcon: ". . . Freight being handled by Transcon between the southeast and southwest area would be subject to diversion by these applications. The importance of such traffic to Transcon is apparent from the following data. . ." (App. 343).

Plaintiff Roadway: ". . . In addition to the diversion that may result from grant of these applications, it also would result in a further imbalance of the roadway operation which is now heavy westbound. During the first half of 1967 Roadway operated 157 vehicles empty from Texas eastward to Atlanta or beyond. Loss of any of its eastbound traffic from the Texas origins or connecting points will result in greater imbalance." (App. 345).

Applicant-protestant Herrin: ". . . A very substantial portion of Herrin's freight will be subject to diversion if these applications are granted." (App. 346).

Plaintiff ET&WNC: ". . . A large portion of the freight which is handled by ET&WNC either single-line or joint-line will be subject to diversion if these applications are granted. . . This is valuable and necessary traffic and any loss will adversely affect ET&WNC." (App. 347).

Plaintiff United (now Campbell): ". . . Any diversion of its traffic will adversely affect United and its ability to continue quality service, particularly at the small communities between Birmingham and Atlanta. A further imbalance of its traffic flow which may result from such diversion also will be detrimental to United." (App. 348).